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FOR FULL TABLE OF CONTENTS SEE PAGE IX

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TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
MAY 1940 JOVRNAL VOL. XXVI NO. 5

Washington Letter

"Good Behavior" Bill Defeated

THE action in the House of Representatives on the bill to remove federal judges, below Supreme Court rank for "behavior . . . other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution," not only was of high importance, but the discussion of the bill on the floor of the House was intensely interesting.

The basic bill on the subject was H. R. 5939 which came from the Judiciary Committee May 3, 1939 with House Report No. 537. Toward the close of the debate, H. R. 9160, introduced by Mr. Sumners March 29, 1940, was, in effect, substituted for the earlier bill; the later one applying also to Circuit Judges whereas the earlier one had included only Judges of the District Courts. The provision was that, upon resolution of the House of Representatives directed to the Chief Justice of the United States stating that in the opinion of the House there is reasonable ground for believing that the behavior of a judge has been other than good behavior, the Chief Justice shall convene or cause to be convened a court of three Circuit Judges to try in special term the issue of good behavior and the right of such judge to remain in office. A right to challenge any member of the proposed court for cause would be extended to the accused judge, subject to approval of the Chief Justice.

The report of the House's consideration of this subject covers twenty-seven pages of the Congressional Record, beginning at p. 6326 of Vol. 86, No. 70, April 9, 1940. It is impossible to give an adequate picture of the discussion in summary form; hence any one more than passingly interested in the subject very well might care to read the whole argument pro and con in the Record.

Mr. Sumners Speaks for the Bill

Among the statements of Chairman Hatton Sumners of the Judiciary Committee were the following:

"I have a very deep conviction, both with reference to the constitutionality of the proposed measure and with regard to the necessity for its enactment. I do not know how anybody can attend upon the Senate, and I mean no disrespect—and I speak of the Senate now not as a part of the legislature, but as a high court of impeachment—I do not see how anybody with common sense can go over there and attend upon the Senate trying an impeachment and feel that the proceeding there is any way to try any issue where the interest of the individual or the public is involved . . .

"I say this not as any reflection upon the Senate, but we are asking the Senate to do a perfectly ridiculous thing. It is not fair to the Senate. We are asking the Senate of the United States to turn its back on all of its general responsibility and sit and try an issue that ought, of itself, to be tried in a court in the first instance, and the Members of the Senate—and I say this not in criticism, but to state a fact—they take a solemn oath to try that case and if they were trying any judge before them who would try a case before him as the Senate would try an impeachment case, they would all impeach him right away. I do not say this in criticism. I say it in criticism of the legislative branch of the Government that has a chance to do something else besides standing here and talking about 'the fathers.' We need some sons that have as good sense as our fathers who sat in the Constitutional Convention had and do our job as well as they did theirs, and then we would stop that perfect farce in the Senate. . . .

"We introduced evidence over there in the Senate from witnesses whom we had brought from California, from across the continent, and three Senators were sitting on the floor. Can we then get up here and brag about that as a method of doing business? . . .

"I am convinced that something has got to be done about this and sooner or later it is going to be done. Do you mean to tell me that the common sense of the Nation, looking on a farce like these impeachment trials, will continue to stand for it? I want to continue to repeat I am not holding the Senate primarily responsible. It is just a situation where human beings, these Senators with their many duties, have imposed upon them an additional responsibility which it is unfair and ridiculous to impose.

"Those men in order properly to try one of these cases have got to turn their backs on the business of the Nation while they sit there and try to act as judges, when they are not. Their duties will not permit them to do other than set a bad example for the judges over whom they have the power to try and to impeach. . . .

"I realize the difficulties confronted in trying to have this bill considered on its merits. In the first place there is the inherited notion that there is some provision in the Constitution about judges being removed by impeachment. The average person in America believes there is something said in the Constitution about impeaching a judge. If I should ask this audience, largely made up of lawyers, if there is anything in the Constitution in regard to the impeachment of judges, many of them would answer yes. There is, however, not one single word in the Constitution about impeaching judges.

Language of the Constitution

"This is the applicable language:

"'The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of, treason, bribery, or other high crimes and misdemeanors.'

"If this language means that judges may be removed only by impeachment, it means that other civil officers may be removed only by impeachment.

"The converse of it is true, of course. If other civil officers, despite that language in the Constitution, may be removed by means other than impeachment, then that language in the Constitution does not prevent judges being removed by methods other than impeachment. . . .

"Impeachment never was one of the ordinary regulatory processes or powers of any government, and, what is more, it never can be. Impeachment arose in the fourteenth century as a method of bringing to justice

great offenders in England who were greater than the ordinary processes of government could deal with. When this process was put into operation in England by the House of Commons it was a real trial before a real court. Do not forget that. Never in all the history of England was impeachment other than a trial before a court, the highest court of the realm, the House of Lords. It was a real trial with the usual processes and procedure of a trial by a court. The Commons appeared at the bar of the court, appearing in behalf of the people of the realm before the highest court of the realm, against some great offender who was bigger than the ordinary machinery of government could deal with. . . .

"You gentlemen come from States having constitutional arrangements, speaking generally, identical with these Federal provisions. You know that under these identical provisions you can impeach a public officer or you can oust him for bad conduct by a civil suit in an ordinary court.

Ouster of Public Officers Without Impeachment

"Not one of you comes from any State but where the State may by an ouster suit by quo warranto or scire facias oust any public official notwithstanding the fact that he may be impeached also. I wait for anybody to rise in this hall, who comes from a State with an identical constitutional arrangement, who will contend that because of that provision in the Constitution that is the sole method of removing a public officer. . . .

"May I direct your attention to the fact that recently we enacted legislation providing for administrative officers, with the machinery under the control of the Supreme Court and the presiding judges of the circuit court. Those officers, among other things, check in on the courts.

"This proposed legislation fits in with that legislation. If enacted, it would go far not only to more firmly establish an independent judiciary without lessening in any degree the power of the House and Senate under the impeachment provisions but would strengthen the judiciary in its great duty and interest to keep the judiciary fit to be independent. There is nothing more dangerous now to the independence of the judiciary than to swing to a great extreme in a mistaken zeal for a so-called independence of the judiciary."

One point, in opposition to the bill, which seemed to have substantial weight in the minds of some members, was concisely stated by Edward H. Rees, of Kansas, where he said that it would "provide a little more chance for individuals to bring pressure against our judges because they may be aggrieved on account of decisions that a particular judge has rendered against them."

In his remarks, Representative U. S. Guyer, of Kansas, recalled what "John Marshall said about the independence of the judiciary, because it was he who galvanized the judiciary department of the United States into the greatest legal system in Christendom.

"He said:

"'Is it not to the last degree important that the judge should be rendered perfectly and completely independent with nothing to control him but God and his conscience? . . . I have always thought from my earliest youth 'til now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.'

Mr. Guyer also said:

Mr. Guyer of Kansas Opposes Bill

"We have no adequate time to go into the argument concerning the constitutionality of this proposed law. But we insist that the Constitution provided impeachment as the method of trying the matter of the conduct of Federal judges, and that this is the sole method within the Constitution. Many other plans were proposed but all were rejected except impeachment, in which the House of Representatives 'shall have the sole power of impeachment' and the Senate 'shall have the sole power to try all impeachments.' . . .

"I sympathize with the distinguished chairman of the Committee on the Judiciary, who tried these impeachment cases before the Senate. I was one of the board of managers. The trouble with those cases was they were based upon sort of petit larceny, and you could not expect the Senate to sit there and listen like a justice of the peace to a petit-larceny case. These judges should never have been impeached. It reminds me of Tom Heflin's story about the two horse traders. They looked at the horses' eyes. They knew all about horses. So they traded horses. One of the horses ran into three trees in about a half minute after he was turned loose. The other fellow says, 'Your horse is blind.' 'No; he is not blind,' was the answer, 'he just don't give a damn.' That is the way with the Senate about those cases. They were based on trivialities. . . .

"If a judge is guilty of petit larceny, he can be impeached by this House. There never has been a judge charged with misconduct here that the House has not voted to impeach since I have been a Member of Congress. It requires very little provocation to induce the House to vote for impeachment. . . .

"In conversation with the late Senator Borah, who was not going to vote on the Lauderback impeachment case because he had voted against his confirmation, I said, 'What do you know about it, Senator? I have not seen you on the floor.' He said, 'I read every word of the evidence the next day in the morning before the case comes up at noon, and I know other Senators who do.' They can do that and I found that most of them read the record of the trial which was before them each morning."

Proponent of Bill Makes Argument

The case for the bill was opened by Sam Hobbs, of Alabama, who spoke at some length and cited numerous authorities. He stated that "The most serious argument advanced against the constitutionality of this bill is *expressio unius, exclusio est alterius*. From the Latin maxim opponents argue that because the impeachment power provides a mode of removing a judge and no other mode is expressly set forth in the Constitution no other mode may be provided by law. In other words, the expression of the one excludes all others. The Constitution has this and nothing more to say on the subject of impeachment:

"'The House of Representatives . . . shall have the sole power of impeachment.'

"'The Senate shall have the sole power to try all impeachments.'

"'The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors.'

"That is all. There is no hint that judicial ouster is interdicted. In fact, the impeachment power and all provisions relating thereto are found in articles I and II of the Constitution, which are separate and distinct from article III, which deals with judicial power and prescribes that 'the judges of both the Supreme Court

and inferior courts shall hold their offices during good behavior.'

"There are five reasons why the maxim *expressio unius, exclusio est alterius* can have no application whatever to this bill . . ."

New York Congressman Speaks Against Bill

Sources of further information were cited by Clarence E. Hancock, of New York, where he referred to "a scholarly study of this subject, written by Judge Otis, of the United States district court, and I wish everybody in the House had time to read it. It has been very helpful to me in understanding the questions involved in the pending bill. And may I also commend to your careful reading the minority report prepared by our able colleague from Iowa, Mr. Gwynne?"

Mr. Hancock said also:

". . . We all sympathize with the objectives of our good friend from Texas. He wishes to provide a more expeditious way of getting rid of bad judges, but that is perfectly possible without any legislation whatever. The remedy lies in the hands of the Senate. When the Senate tries an impeachment case against a judge or any other official, they are not acting in a legislative capacity, but they are acting as a court, and as a court they have the attributes and rights of a court. Furthermore, they can make their own rules. There is no reason in the world why the Senate could not do as every other court in the land does, appoint referees or commissioners or special masters to take testimony and make findings of fact as a guide and help to the Senate, and report back to the Senate. So long as the final judgment is made by the Senate of the United States, the Constitution is not violated. It might be desirable to have simpler means provided for getting rid of bad judges than that provided by the Constitution, and I am not entirely convinced in my own mind about that, but I maintain that we cannot do it without amending the Constitution. I would like to follow the way my chairman points out, because I am genuinely fond of him and I have the greatest admiration for his legal ability, but according to my logic, this bill is unconstitutional, unwise, and unnecessary. . . .

Dilemma Suggested

"In my estimation, and I would hesitate to advance this if it were not fortified by substantial authority, the two provisions for the termination of a judge's tenure of office mean exactly the same thing as used in the Constitution, that is, bad behavior has the same meaning as high crimes and misdemeanors. It cannot mean any more. If it does, you get to this situation. Obviously, if a judge is guilty of accepting a bribe, he comes within the provisions of section 4 of article II, and he must be impeached. There is no gap in the law there and there is no alternative. He must be impeached. But suppose a judge is guilty of trying a case in which he has bias or in which he has an interest. That is not a high crime or misdemeanor within the understanding of the proponents of this bill, but it is misbehavior, and therefore a judge could be tried by a court of three circuit judges if this bill becomes law. If we prefer, we can set up a court of one judge and make that offense triable by one judge. So you have a ridiculous situation, if the logic of my friends on the other side is correct. A judge accused of accepting a bribe must appear before the Senate and be declared innocent unless found guilty by two-thirds of that body, whereas a judge guilty of a minor offense could be removed from office by the judgment of a single judge. In other words, you would make it far more difficult to convict the serious offender than the minor one, although the penalty for both is the same, namely, removal from office."

Speech of Mr. Taft Quoted

One unfortunate element in the discussion was the use (at two different places, in the Record for the day above cited, viz., pp. 6330 and 6338) of a quotation from former Chief Justice Taft which seemed to represent him as saying that present methods of procedure in impeachment cases are adequate; whereas he very clearly was expressing his views to the contrary. Nevertheless, a more careful quotation of Mr. Taft's views would have shown, on principle, that he probably would have been against the presently proposed legislation, because he felt that the Senate's methods of conducting impeachment trials could be improved.

A part of the statement by Mr. Taft, quoted by two different Congressmen, was where he said: "By the liberal interpretation of the term 'high misdemeanor,' which the Senate has given it, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit." But Mr. Taft's sentence did not end with the word "unfit." There was merely a comma at that point, with the thought continuing thus: "and if the machinery for holding the trial could be changed from the full Senate to a judicial committee, with the possible appeal to the whole body, impeachment would become a remedy entirely practical and effective." Reports of American Bar Association Vol. 38 (1913) p. 432: paper by William H. Taft, of Connecticut, entitled: "The Selection and Tenure of Judges," commencing at p. 418. It was at the same annual meeting when this paper was delivered that Mr. Taft was chosen President of the American Bar Association. He then was Kent professor of law at Yale, his term as President of the United States having expired March 4, 1913. He was installed as Chief Justice October 3, 1921.

It is quite possible the belief—that the proper remedy, for the evils so glaringly apparent in the impeachment procedure, lies principally with the Senate and involves its methods of handling such matters — was chiefly responsible for the defeat of this bill in the House, where the vote was 104, for it; and 236, against.

Suggestion of Senate Action

Mr. Sumners, at one point in the discussion, had said: "I suggested one time that the Senate appoint a committee of its own. If the Senate would appoint a committee of its own to take the testimony and then the Senate would feel itself bound to follow the judgment of, say, a dozen Members, that is getting pretty close to what I have tried to do.

"One difficulty is that you have to get a two-thirds majority. It is a pretty bad thing to have a judge serving on the bench when more than a majority of the Senate has said that he probably ought not to be there."

Kentucky Raises Bar Admission Requirements

The outstanding change of the year in State bar admission standards is that of Kentucky. It has recently been announced that the Court of Appeals has revised its admission rules so as to require two years of academic work before a candidate may begin the study of law.

American Law Institute Meeting in Washington May 16-18

THE American Law Institute has two classes of members—official and life members. The number of life members is limited to 750. Each year over eighty per cent of the members attend the annual meeting in Washington, The President of the Institute issues special invitations to attend the meetings to a limited number of persons who are interested in one or more of the matters to be discussed at the meeting. Last year the registered attendance of members and guests was 723.

The program for the Eighteenth Annual Meeting has been distributed to the members. As usual, the sessions will take place in the Ballroom of the Mayflower Hotel.

The Council of the Institute will meet at the Mayflower on Wednesday, May 15. Among the official members of the Institute are the members of the Supreme Court of the United States, the Chief Justice of the highest court in each State, and the Senior Judges of the United States Circuit Courts of Appeals. In the event that the chief judge of the highest court of a state or the Senior Judge of a Circuit Court is unable to attend he designates another member of the court as its representative. This year the Council has issued invitations to the representatives of the various courts to dine with the Council on Wednesday evening. Immediately after this dinner, at nine-thirty, the Council will hold its usual Reception in the Ballroom of the Mayflower to which all members and guests, and the ladies accompanying them, are invited.

Drafts to Be Discussed

One of the notable features of the meeting of the Institute is the address of the Chief Justice of the United States at the opening session (ten o'clock, Thursday, May 16). It is the one address which the Chief Justice delivers during the year, the address usually being an informal account of the work of the Supreme Court during the year. Last year Chief Justice Hughes was not well and his place was taken by the late Justice Pierce Butler. This year the Chief Justice has written the President of the Institute, George Wharton Pepper, that he expects to be present. After the address of the Chief Justice and the reports of the officers of the Institute the rest of Thursday, the 16th, will be taken up by a discussion of the first Tentative Draft of a model Code of Evidence. This draft contains 75 Rules relating to Witnesses. It will be presented by the Reporter, Edmund M. Morgan of the Harvard Law School. The group working on the Rules, as well as the Council of the Institute, are anxious not only that there shall be a discussion of the substantive provisions of the Rules suggested, but also that the whole method of approach and treatment shall be subject to criticism and suggestion.

It is possible that by the time of adjournment on Thursday all the Rules in the Tentative Draft of the Code of Evidence will not have been reached. If so, the Rules not reached will probably not be taken up until the next annual meeting because it is desired that the morning and afternoon sessions on Friday be devoted to a discussion of the two model Acts relating to Criminal Justice: Youth—a Youth Correction Authority Act and a Youth Court Act, and the Proposed Final Draft of the Restatement of Property.

WILLIAM DRAPER LEWIS
Director, American Law Institute

Saturday, May 18, will be devoted to the discussion of the two Tentative Drafts dealing with portions of the division Suretyship in the Restatement of Security.

The Annual Dinner will be held on Friday evening, May 17. These annual dinners of the Institute have one notable feature. The amount of "speechmaking" is strictly limited, the effort being to put emphasis on quality rather than on quantity.

The meeting of the Institute this year has been called a week later than usual in order that the members may, by arriving a day or two before the meeting, attend notable meetings for the discussion of public and private international law and the discussion of comparative law. The Eighth American Scientific Congress, which will be attended by delegates from all the countries in the Western Hemisphere, will meet in Washington on May 10 to 18. The meetings of special interest to the members of the Institute will be those of Section IX—the section on International Law, Public Law, and Jurisprudence, and in connection therewith the meetings of the American Society of International Law and the Section on Comparative and International Law of the American Bar Association. These meetings are being arranged so as not to conflict with the sessions of the Institute. When completed, the programs for the meetings will be mailed to the members of the Institute.

New York Regional Conference

Northeastern States Hold Important Meeting—Discuss Cooperation of Radio, Press, and Bar—Legal Institutes—Admission to the Bar—Unauthorized Practice—Bar Association Activities

SOME of the major problems, the solution of which presently occupies committees or sections of the American Bar Association, were discussed Saturday, April 6, at a Regional Conference under the auspices of the Bar Organization Activities Section, held at the headquarters of the Association of the Bar of the City of New York. Raymer F. Maguire, of Orlando, Florida, Chairman of the Section, presided. Executives and representatives from state and local bar associations and members of the House of Delegates from Connecticut, Delaware, Maine, Massachusetts, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columba, attended.

Among the problems discussed were:

The right of newspapers and radio to report and comment on judicial and quasi-judicial proceedings, and the court's power of limitation;

The Logan-Walter Bill, including a statement by Colonel O. R. McGuire, Chairman of the Adminstrative Law Committee, in reply to President Roosevelt;

The policy of the American Bar Association in regard to public relations;

The progress in preventing unauthorized legal practice;

The value of Legal Institutes to state and local bar associations;

The cooperation between Bar Examiners, Law Schools, and Bar Associations; and

The status of state bar associations in the participating districts.

The panel discussions on "Publicity Interfering with the Fair Trial of Judicial and Quasi-Judicial Proceedings" occupied most of the afternoon session. Part of the discussion was broadcast over the Mutual network.

In opening the discussion Mr. Maguire said, in part:

"Within the past twenty years in country after country peoples have lost their liberties and have been subjected to the rule of dictators. Our constitutional system is built on the foundation stones of liberty and justice. Liberty is important but it would be of little value without justice. Justice can not long endure without liberty.

"One of the liberties that we prize most highly is freedom of speech and of the press. Take away freedom of speech and freedom of the press and all of our liberties are as sure to fall as a house of cards when the first one is taken away.

"But important as is freedom of speech and of the press, it is no more important and no more sacred than a fair and impartial trial guaranteed every citizen by the Federal Constitution as one of the minimum requirements of due process of law.

"One of the Justices of the Supreme Court of the United States recently warned us against the abandonment of 'that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago, that the judge must be perfectly and completely independent with nothing to influence or control him but God and his conscience.'"

Giles J. Patterson, Chairman of the Committee on Cooperation between the Bar, Press, and Radio, outlined the right of trial courts to control or limit proceedings in court.

"The Bar," he said, "recognizes the right of the Press and of the Radio to report the proceedings in the court room. But it asserts that their reports shall be confined to an accurate statement of what transpired; that they shall not be prejudiced nor intended to influence the decision of either court or jury; that they shall not contain matter not before the court nor criticism of court officials until the case is closed. After a case is closed, the right of the Press and Radio to comment on the proceedings or the conduct of the officials is limited only by the rules that limit comment on private individuals, or other public officials."

He listed seven reasons for limiting judicial publicity and added that the only serious disagreement between the Committees of the Press and Radio and that of the Bar has been over the right to take photographs and to install microphones in the courtroom. He gave several reasons why the Bar opposed this.

Paul Bellamy, editor of the *Cleveland Plain Dealer*, declared:

"We of the newspaper calling participate in this meeting by virtue of a special charter from the people of the United States, the first article of the Bill of Rights. Freedom of the press was guaranteed for the benefit of the people, and not for our advantage. Our calling is not as old as the law, but it came into being because some of the older vocations had failed on certain conspicuous occasions and society concluded they needed a corrective.

"Our bounden duty and sacred responsibility, from which we may not escape as long as we live, is to tell truly what is going on in the world, and that, the first commandment, being fulfilled, to preach thereon, and so far as we see the light, to lead others to it. Sometimes we succeed greatly, sometimes we fail lamentably, but none of us is worth his salt who, having spent a lifetime in the newspaper business, could possibly betray the private tick tock in his own heart, this magnificent *noblesse oblige*, to chronicle factually and comment according to his conscience.

"So, to be frank, we will deal with you as equals, or not at all. We do not claim to be modest, but we hope not to be proud. We have been guilty at times of poor taste and worse. But so have you. We have some bad boys in our ranks. But so, I have been told, have you. We have our extremists and so have you. We have individualists so rugged that they would not agree to the Ten Commandments for fear that at some future

juncture such a commitment might interfere with Freedom of the Press. You have their equivalent."

Neville Miller, President of the National Association of Broadcasters, presenting the views of radio, pointed out that the microphone assures a higher degree of accuracy than any other medium of reporting. He said where reproducing devices were in use they were soon taken as a matter of course. He pointed out that few stations were interested in broadcasting trials.

"Where the case will be closed shortly, and discussion had then will tend to correct the errors or wrongful conduct, it would be wise to reserve action until then. However, many cases drag on for years, and prohibiting all criticism during a case may allow the continuation of the misconduct and eliminate all chance of correction. The fear of the infliction of the prescribed legal penalties, should be sufficient to deter anyone from overstepping the line."

"A fair and impartial trial, and the preservation of respect for the courts, are matters of the greatest importance to our democratic form of government, and I can pledge you the patriotic and wholehearted cooperation of the broadcasters. However, on the other hand, we do ask that during this, the developing and growing age of radio, that we realize we are living in a changing world, that radio be given full opportunity to demonstrate its usefulness as an instrument for the public good, and that we go slow in enacting prohibitions, especially those based largely upon fear of the unknown qualities of radio and upon the mechanism necessary for broadcasting."

William Allen White, Editor of the *Emporia Gazette*, pointed out the wide latitude and power which the founding fathers had given to the three great branches of the government. But over and above these, he said, was the power of public opinion. He discussed the effect of newspapers, radios, and motion pictures upon public opinion and declared "it is of vital importance that these agencies which make public opinion in relation to the final legal expression of the American government should be as free as possible."

"I don't fear greatly that freedom of the press will be injured by citations for contempt. The courts can well afford to stop this side of contempt, withholding punishment and stating their case to the public. The greatest contempt by a newspaper is to print a biased opinion but after the case is settled and the jury has come in, it is no longer a case pending, and we have the greatest right to say what we please. The bill of rights was made not only for the wise and the just. The Bill of Rights was invented to allow a man to make a damn fool of himself in his own way.

"This is not a solution but a suggestion that all work together toward the same end. Men of good will, men of intelligence in this country will be the arbiters of which way we go as Americans; of what course we follow. So long as we are free even to be foolish I think that citations for contempt do very little more than to raise irritations. The courts may well stop, look and listen before resorting to punishment in citation."

The discussion of the Logan-Walter Bill was introduced by a statement from Colonel O. R. McGuire, and read by Miss Adele Springer. After President Charles A. Beardsley had told the conference that the bill was being held up because Washington bureaucrats did not want the Congress to vote upon it, several of those present urged that telegrams be sent to Congressional representatives urging immediate action upon the bill.

Colonel McGuire's statement declared:

"This bill does not apply the court rules in either civil or criminal cases. The bill does not apply any rules of evidence or any rules of pleadings in civil or criminal cases. The framing of the issues before the administrative agencies is very informal and may be by letter and it may be by more formal proceedings. The bill aims to get at the merits of controversies of the Federal Agencies and to avoid the decision of cases on technical points of procedure as is now the general rule. An examination of the Federal cases in the Courts will show that a large number of them are decided on technical points of procedure and not on the merits. For instance the Kansas City Stockyards case has been before the Supreme Court four different times and the Court has not yet reached the merits of whether the rates fixed were fair or unfair, constitutional or unconstitutional.

PAUL BELLAMY
Editor, Cleveland Plain Dealer

"Instead of slowing up the transaction of public business in the decision of cases, this Administrative Law Bill will cut the time in half or cut off two-thirds of the present delay. It will do this, first, because any differing opinions in the Circuit Courts of Appeal must be immediately certified to the Supreme Court of the United States where the issue can be finally determined and the conflicts between the Circuit Courts of appeal removed. Now, this will cut the delay by at least three months and possibly more.

"Second, instead of building a record before the Administrative Agencies as is now the present procedure and another one in the Courts where the matter is determined by direct suit, this bill will enable the record which is built in the Administrative Agencies to be used in the Courts and, thus again, cut the time very materially. This is due to the fact that only one record will be required instead of two as under the present procedure.

"Thirdly, the record before the Administrative Agencies will be built in the same way that records are built in the Trial Courts, that is, by examination and cross-examination of witnesses, presentation of the proper documents, if any, and in an attempt to acquaint the

reviewing authorities with the actual case. This will result in saving much time which is now spent in fighting over technical points of procedure.

"Fourthly, when these bureaucrats know that they must decide the cases on the merits and in the proper manner or else be reversed on appeal in the Courts, they can and will decide them in accordance with the law and the facts, thus saving much time and much expense to the individual and to the taxpayers.

"Fifthly, the United States, with the resources of the Federal Treasury, has more money than any private litigant and the records show that under existing procedure very many cases are appealed by the United States. In fact, most of the Writs for Certiorari granted by the Supreme Court of the United States in Government cases are granted on the petitions of the Department of Justice and not on the petitions of the private parties.

"Sixthly, the issuance of public notice and the holding of public hearings before the issuance of rules and regulations and the subsequent possibility of review of those regulations in the Courts will in itself tend to reduce the amount of litigation and the amount of time and money that is now spent in the Courts in litigating these regulations when they are involved in the merits of some controversy. This, in turn, will result in much less litigation of cases in the courts."

Sylvester C. Smith, Jr., of Newark, New Jersey, Chairman of the Public Relations Committee of the American Bar Association, outlined the program so far developed by his Committee. He told of the need of closer relationship between the American Bar and local bar associations first with each other, second with lawyers generally, and third with the public. He told of conferences with experts in public relations and suggested that one practical solution was in preparing more attractive notices of bar meetings which would hold the attention of the recipients.

Mr. Smith also discussed conferences with motion picture producers with the view to having lawyers depicted as they are and not as "crooks and villains" as has been done in some pictures. He also said the Committee had been able to have lawyers represented more accurately in radio broadcasts.

Mr. Smith said that one of the important duties of his Committee was to act as a clearing house for ideas on public relations of other committees of the American Bar Association and of local and state bar associations as well. He pointed out that fundamentally the best way to start any public relations program was in the local association.

Edwin M. Otterbourg, of New York, Chairman of the Committee on Unauthorized Practice of Law, told the group that he was convinced that there was a great deal of misunderstanding of what the lawyers were trying to do not only in the minds of a large number of the public but in the confused thinking on the part of many of the lawyers. He said that hasty and ill-considered actions by Bar Associations caused much of this misunderstanding to broaden out. He pointed out that the subject of unauthorized practice was very close to the public relations of the bar to the public and that he was convinced that the public would back up the lawyers when it understood what they were trying to do.

He said the lawyers relation to the public boiled down to four essentials: They were first, the lawyer must have skill, second he must be completely disinterested, third he must be loyal to his client alone, and fourth he must be responsible as an expert.

> "Unauthorized practice of the law breaks down this whole system. It is directly contrary to what the lawyers are trying to give to the public. Neither laymen nor corporations have all four essential qualifications."

He said the arguments against lawyers who seek to halt unauthorized practice of the law were first, lawyers are no good because there are so many crooked lawyers; it is cheaper not to employ lawyers; the practice has been going on for 40 or 50 years; and by filling in blanks in legal forms, there really is no legal advice given. He answered each of these arguments.

He told of the conferences which have been held with various national groups and which have resulted in

New York Regional Conference Goes on the Air

Albert Cornwell

WILLIAM ALLEN WHITE
Editor, Author, Distinguished Citizen

statements of principles guiding both the lay group and the lawyers in what was and was not practice of law.

The discussion on legal institutes, which opened the afternoon session, was led by W. E. Stanley of Wichita, Kansas. He pointed out the increasing number of institutes which were being held in the various states both by state and local associations. He told the group that this was one of the best methods of interesting lawyers in bar association work. He said a lawyer who felt he had been given something and had something to take away from a bar meeting was much more likely to become interested than one who felt bar associations never did anything.

The group was told by Mr. Stanley that experience in many states has been that judges often could be interested in these institutes by inviting them to take part. He cited as an instance a state in which the Chief Justice of the Supreme Court was invited to speak at one of the institutes. The Chief Justice, he said, discussed the type of brief which was most effective before his court, adding that that meeting not only drew a large number of lawyers who profited considerably by the advice of the Chief Justice but that it had been repeated with an even larger number of lawyers in attendance.

The cost of legal institutes, he pointed out, was not excessive. Local specialists in a particular phase of the law could be prevailed upon to speak without remuneration and usually a law printer could be induced to print the notices and programs without charge. Often a meeting place could be had without cost so that the expenses were kept at a minimum.

The discussion on Cooperation between Law Schools, Bar Examiners, and Representatives of Bar Associations in connection with admissions to the bar, through a joint conference on legal education, was opened by John Kirkland Clark of New York. He referred to amendments of rules by the court which, he said, were made by unanimous request of both the bar groups and the deans of the law schools. These rules were designed to raise the standards of the bar and as a result the number of incoming lawyers have been reduced one-half in the last eight years. "The most valuable contribution has been the humanizing of the relationships between the several groups. The most effective work was that the deans of the law schools got better acquainted," he said. He added that the "high-brow" and "low-brow" schools found they were not far apart.

Dean Ignatius M. Wilkinson of Fordham Law School discussed the same problem, supporting with statistics the facts alluded to by Mr. Clark. The Dean said these changes were made under rules of the court and that legislation was not needed.

Mr. Beardsley urged members of the state associations to "stop talking about the problem and do something about it." He suggested that state bar presidents appoint committees in their states to start this work of cooperation.

The organization and activities of the various state associations were described by the representatives. They told of the work that was being done in relation to the lawyers of their state; of legal institutes which were being held; and of the efforts toward integration.

L. Stanley Ford, Secretary of the Section and Public Information Director of the Junior Bar Conference, outlined the work that the Junior Bar group is doing in that field.

A luncheon in honor of President Beardsley was held at the City Club and attended by many of the 200 lawyers who attended the sessions.

ELEMENT OF A CRIME

(from 3 Corpus Juris Secundum)

ALEVOSIA. In Spanish law treachery, which is a qualifying or inherent element of certain crimes and an aggravating circumstance of others. The penal codes in Spanish Countries usually provide in effect that there is alevosia when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended person might make; hence it presupposes premeditation.

It has been held that assaulting or killing a bound and helpless victim generally shows alevosia; and that so does attacking a victim while asleep, or, usually, attacking from behind, or assaulting a blind person, a defenseless old man, a defenseless female, or a child of tender years. Alevosia has likewise been held to be disclosed by attacking an unarmed or unprepared victim, or under cover of darkness, or when otherwise concealed, or by a sudden and unexpected, although frontal attack, especially where the purpose is disclosed of taking the victim unawares; or where the attack is treacherously made.

Procedural Rules When Government Is Litigant*

BY ALEXANDER HOLTZOFF
Special Assistant to the Attorney General

IT IS not my purpose in the short time at my disposal to discuss the rules generally. It will be my endeavor merely to refer to a few questions that have arisen under them during the past year in respect to their application to the Government as a litigant. It is that phase of the rules that concerns principally this Department and the United States Attorneys' offices.

We start with the premise that the rules, except where otherwise specified, apply with equal force to the Government as a litigant as they do to private parties. There are certain specific situations, however, in connection with the application of the rules that are peculiar to the Government and it is to those problems that I want to direct your attention this afternoon.

Discovery

The first of these subjects is that of discovery. The discovery provisions of the rules are found in the rules relating to the taking of depositions, production of documents, filing of written interrogatories and requests for admissions. The Government necessarily has the same privilege of seeking a discovery when it is a party to a law suit that is extended to any private party. Conversely, the Government is subject to discovery in the same manner as any other party would be, with certain qualifications which I shall discuss in a few moments.

As an example of the use of discovery against the Government, I want to refer to a War Risk Insurance case decided a few months ago in the District Court in Massachusetts by Judge McClellan.[1] In that case, the plaintiff made a motion for the production and permission to copy and photograph certain papers in the Government files. The court permitted the plaintiff's counsel to examine and copy records of Government hospitals and reports of Government physicians relating to the plaintiff, which were in the Government files. On the other hand, by the same token, the court denied to the plaintiff the privilege of examining certain work records and time sheets that the Government had obtained from various concerns by whom the plaintiff had been employed. The court said, very wisely I think, that, "Information of this kind having been obtained by the Government by application to third parties, was not subject to plaintiff's inspection."

It seems to me that this ruling is a useful guide, not only in War Risk Insurance cases, but in other cases as well in which the discovery process is attempted to be used against the Government as a party. In general, one may say that the decision that I have mentioned follows the rulings that have been made under similar circumstances in respect to private litigants.

"Privilege"

There is one situation, however, in which the Government is in a peculiar position. You will recall that under the rules, depositions may be taken concerning any relevant matters not privileged. In the same way, material documentary evidence may be produced and examined, provided it is not privileged. Ordinarily, of course, as between private parties, the word "privilege" refers to such confidential relations as those between attorney and client, husband and wife, physician and patient, priest and parishioner. The Government, however, has certain privileges which it may invoke under these rules which are not open to private parties. First, it has been well established for a great many years that if a Government Department or Bureau or other Agency has promulgated a general rule that certain of its records and files are to be deemed confidential such a regulation creates a privilege which will be recognized by the courts. Papers within the scope of such regulation are, therefore, not subject to production and examination.[2]

An interesting situation arose in that connection several years ago. Certain records of the Federal Bureau of Investigation were subpoenaed by the District Court in Los Angeles for use in a private litigation. The Bureau has always had a regulation of the type to which I refer, namely, that its records are confidential. An Agent responded to the subpoena, but respectfully declined to submit the papers for inspection, citing this regulation. The District Judge forthwith committed him to the custody of the Marshal for contempt of court. The United States Attorney with equal celerity obtained a Writ of Habeas Corpus from a Circuit Judge, returnable before the Circuit Court of Appeals for the Ninth District. The Circuit Court of Appeals reversed the District Judge and sustained the position of the Bureau Agent in declining to submit the papers for inspection. This is the so-called Sackett case which we look upon as a leading authority upon the question which I am discussing.[3] While this case was determined before the new rules went into effect, its conclusion is not affected by them, because the new rules expressly recognize privileges against the production of documents and this case re-affirms the privilege that is accorded to Government documents.

In line with this principle, the District Court for the Middle District of Pennsylvania in *Federal Life Insurance Co. v. Holod*, 30 F. Supp. 713, decided on January 12, 1940, declined to require the production of certain World War draft records on file in the War Department, and held that such records were privileged within the meaning of the new Rules.

Government Files as Confidential

The Department had this ruling in mind when it promulgated last May this so-called Order number 3239 which provides that all Departmental files are to be regarded as confidential. This regulation, among other things that it accomplishes, is a protection against compulsory production of any Departmental files in response to a subpoena *duces tecum* or other process whenever it is deemed in the best interests of the public not to produce them.

The second privilege that the Government has in this connection is that the production of documents may be refused by it if the head of the Department, in whose custody the documents are found, formally certifies that in his opinion it is contrary to the public interest to disclose the specific papers, the production of which has been demanded. There is an Attorney General's opinion, dating back to 1905,[4] establishing this principle, which has been recognized by the courts time and time again and especially by the District Courts of the District of Columbia where the question frequently arises.

1. *Galanos* v. *United States*, 27 F. Supp. 298, 25 A.B.A.J. 494.
*An address before the Conference of United States Attorneys.

2. *Boske* v. *Commingore*, 177 U. S. 459.
3. Ex parte *Sackett*, 74 F. (2d) 922.

Patents Useful in National Defense

Rather interesting applications of the principle of privilege of Government documents occurred in the District Courts of Massachusetts and New York some months ago. There was a patent suit brought by a patentee of certain submarine signalling apparatus. The defendant in that action was a Government contractor who was manufacturing the apparatus for the Government. The plaintiff called on the defendant under the new rules to disclose the details of the structure which he was fabricating. His position was that the details of the structure pertained to National defense and involved National defense secrets. The court sustained the objections to such disclosure and held that the matters were privileged by reason of the fact that they were secrets pertaining to the National defense.[5] A similar result was reached in a patent suit in New York, in which the Government intervened for the sole purpose of asserting the secret character of the information.[6] These are important rulings, which may at times be useful because of the fact that there are Government contractors operating in a great many districts all over the country.

Third Party Practice

Let me pass on for a moment to the subject of third-party practice. It has been held in the Eastern District of New York that the Government may be brought in as a third party by third-party practice into a private litigation, if the claim asserted against it is a claim in respect to which an independent suit would lie against the Government.[7] Conversely, in a case in which the United States is plaintiff, the defendant may bring in a third party. For example, there was a case in the Minnesota District in which the Government brought suit on a bond against a bonding company.[8] The defendant surety company in turn brought in the principal who had indemnified it, as a third party, by third-party practice and this was held to be proper. The judgment when finally rendered ran for the Government as against the defendant surety company and also in favor of the defendant surety company as against its indemnitor.

The Government likewise has been assumed to be subject to summary judgment procedure and of course the Government as a plaintiff has frequently asked and at times has been successful in obtaining summary judgments.[9]

Now, the question of serving process on the Government. Rule 4 in one of its sub-divisions expressly provides how process may be served on the Government as a party to a law suit. It has been held that the existing statutes governing the manner of serving the Government as a litigant have been superseded by the new in all cases be that prescribed by the rules rather than rules and that the mode of serving the Government must by the existing statutes.[10]

Pre-Trial Procedure

I want to say a word about pre-trial procedure. Necessarily pre-trial procedure is equally applicable to all kinds of civil litigation under these rules. I have been told, however, of a rather interesting application made of pre-trial procedure in one district with considerable success. One of the members of this conference told me that he had, like most of you, a large docket of F. H. A. cases. He placed all of his F. H. A. cases on a pre-trial calendar and had all of them called for pre-trial procedure. Practically all of them were disposed of in that manner without any further proceedings. This is one of the many illustrations that might be adduced of the successful results that have been obtained under the pre-trial practice prescribed by the new rules in those districts in which pre-trial has been used on a large scale.

A Fifth Circuit Decision

There is just one other topic to which I want to refer and that is a decision that was rendered last week by the Circuit Court of Appeals for the Fifth Circuit in the case of *Lynn* v. *United States*, which involved an action against the Government under the Tucker Act. The decision of the Circuit Court of Appeals in that case contains a rather startling *dictum*, which is contrary to what has heretofore been the general understanding. That *dictum* is to the effect that the new rules of civil procedure do not apply to actions under the Tucker Act. The Tucker Act cases, of course, comprise actions against the United States on contracts and tax suits against the United States in those instances in which the United States of America rather than the Collector of Internal Revenue is named as the defendant. The court in its *dictum* states that the Enabling Act of 1934, under which the new rules were promulgated, empowers the Supreme Court to adopt rules for actions at law and for suits in equity. The Fifth Circuit observed that actions against the United States under the Tucker Act are neither actions at law nor suits in equity. This suggestion throws considerable confusion into the state of the law in reference to procedure in Tucker Act cases. The District Court decisions in other circuits, to which I have referred previously in my remarks, have invariably treated Tucker Act cases as coming within the scope of the new rules. Some of them directly so held and, as I have stated, have reached the conclusion that prior statutes governing procedure in Tucker Act cases must be deemed repealed and superseded by the new rules. The Department generally has assumed that Tucker Act cases are subject to the rules and has governed itself accordingly, and I think this is probably the general understanding of the bar. With due deference I venture the suggestion that perhaps the Fifth Circuit has placed too narrow an interpretation on the Act of 1934, and, therefore, I am not at all confident that this *dictum*,—and it is only a *dictum*,—is likely to be followed in other districts and circuits. Moreover, the court overlooked the provision of the Code requiring the District Courts in Tucker Act cases to follow the established rules, in so far as applicable and not inconsistent with Statutes.[11] I felt, however, that the *dictum* was of such importance as to justify its being referred to in this discussion in view of the fact that it relates to Government litigation. Of course, it is confined solely to actions against the United States of America on contracts or for a tax refund in which the United States of America is named as the defendant.

4. 25 Opp. A. G. 325.
5. *Pierce* v. *Submarine Signal Co.* (D. Mass.) 25 F. Supp. 862.
6. *Pollen* v. *Ford Instrument Co.* (E. D. N. Y.) 26 F. Supp. 583.
7. *United States* v. *American Surety Co.* 25 F. Supp. 700.
8. *United States* v. *United States Fidelity & Guaranty Co.* 63 D. J. Bull. 19, 26 A. B. A. J. 362.
9. *Boerner* v. *United States* (E. D. N. Y.) 26 F. Supp. 769
10. *United States* v. *American Surety Co.* (E. D. N. Y.) 25 F. Supp. 700.
11. U. S. Code, Title 28, sec. 761.

LAW OFFICE ORGANIZATION

How to Make the Lawyer's Office More Efficient—Business-Like Management Brings Economy and Effectiveness—Practical Suggestions as to Principles and Procedure

By Reginald Heber Smith
of the Boston, Massachusetts, Bar

OUR legal periodicals and bar association reports are full of articles about the proper organization of the courts and the efficient administration of justice but for some strange reason they are virtually barren of articles about the organization of law offices and the efficient practice of the law. Certainly it is essential that the citizen should have his day in court as promptly and as cheaply as possible but it is just as important that when he wishes to consult a lawyer about a matter of litigation or needs legal advice or legal instruments drawn he should be able to obtain expert service without delay and at minimum cost. These desirable ends are much more likely to be produced by a well organized office than by one in which there is no real system and where the organization is haphazard.

By temperament most lawyers are strong individualists and instinctively they shy away from the idea of a "system," fearing that it implies a lot of rules, rigmarole, and restraints. We are apt to take refuge in the thought that after all we are engaged in a profession and not a business. But does it follow that we are entitled to practice our profession in an unbusinesslike manner? The statement that a law office needs an accurate cost accounting system seems revolutionary, but if every business concern has to know its costs, why should the law office be immune? Finally, there is a widely held idea that carefully planned organization is an expensive luxury which only the very large firms can afford. I should put it the other way around; I think it is the smaller firms handling the average legal business of average people which are most in need of efficient organization. I believe that the basic principles of organization are just as applicable to a two-man firm as to one of ten partners or to one having fifty lawyers on its staff.

In this series of four articles for the Journal I shall not try to present "the perfect system." I shall simply endeavor to describe a system that has been in actual operation for twenty years and has worked reasonably well. Since there is no mystery about it I ought to be able to make its essential features clear to any practicing lawyer and I can assure him in advance that he will not encounter a lot of technical jargon. In any event, the articles are written in the hope that they may be of some interest and benefit to the profession at large.

What a Good Office Organization Brings to the Lawyer

At the outset and, frankly, to lure the reader on, let me record my conviction that system and organization have produced for us the following benefits: (1) The elimination of waste has saved thousands of dollars, and a dollar saved is a dollar of added income. (2) The attorneys have been able to produce the best work of which they were inherently capable. (3) Morale and esprit de corps have been kept at a high pitch because the men believe the rules of the system are fair; indeed they have made the rules themselves. (4) That nightmare of partnerships—how to divide the profits justly among the partners—has been dispelled. That problem has always tended to be a disruptive force in partnership life; but no partner has ever left us to join any other firm. (5) Cost control has enabled us to handle at a moderate profit a great many small cases which otherwise we should have handled at a loss or perhaps not at all. (6) We have been enabled to grow from a small group of men to a somewhat larger group.

The extinction of the dinosaur proves that mere size is no guarantee of survival in the competitive struggle for existence. Neither is mere smallness a guarantee. The best statement I have found is in "The World and Man as Science Sees Them" (University of Chicago 1937) at page 252:

> "Mere increase in size, as such, is of no benefit to an institution, a population, or the body of a living organism. The value of such an increase hinges entirely upon the possibility that the larger organization may be able to maintain itself more effectively in certain environments, may accomplish certain useful things that the smaller organization could not, or may discharge certain functions more efficiently."

In the practice of law, the growth of the firm-organization to a reasonable size in harmony with its community-environment enables its men, to a greater or less degree, to specialize in their work. Specialization is the first key to maximum efficiency and minimum cost.

Advantages of Specialization

The service the lawyer renders is his professional knowledge and skill, but the commodity he sells is *time* and he has only a limited amount of that. Efficiency and economy are a race against time. The great aim of all organization is to get a given legal job properly done with the expenditure of the fewest possible hours.

A brief analysis lays bare the root problem that confronts every man who tries to earn his living by practicing law. The law is so vast that no man can know it all and no one pretends to. A client's case (let us say an income tax matter) involves a point with which the lawyer is not familiar. Probably he can find the law, but it may take him ten hours, whereas the specialist in tax law should be able to answer the same question in half an hour. The general practitioner either must spend the ten hours or fail to give his client fully competent advice. The client may be able to pay for one hour of time but not for ten. The nature of the case and the amount involved may not warrant the expenditure of over five hours. The logical solution then would seem to be to have lawyers specialize in the great fields of the law and along functional lines—one to devote himself to real property law, a second to corpora-

tion law, a third to taxes, a fourth to the trial of cases in court, and so on.

But most clients do not go to lawyers because they are specialists in a given field; they generally are not even aware of it. They go to a given lawyer because they know, like, and trust him. The client with a tax case is just as likely to go to the real estate expert and the client with a land problem to go to the tax expert. Each lawyer who has received a case is hesitant about referring it to the appropriate expert. Perhaps he ought to and if he is very busy, he may, but it is human nature not to want to lose a case and possibly a client. Self-preservation is here at cross-purposes with efficiency.

It is in the public interest and in the lawyer's own interest that this problem should be resolved. It is plainly in the public interest that all its essential services shall be performed as efficiently as possible. This applies to legal services. If new lay agencies, being less hampered by tradition and custom, discover or invent ways of getting things done more efficiently and more cheaply, they will constantly encroach on what have been regarded as the prerogatives of the legal profession. Committees on Unauthorized Practice of the Law have done splendid work but they will ultimately be in the position of King Canute if the organized Bar lets them down. There is no reason for the Bar to default. The Bar can do anything lay agencies can do and, because of education, discipline, and standards, can do it better, provided only that the Bar will adopt and utilize modern principles of systematic organization, which the lay agencies do use but on which they need have no monopoly.

The Partnership Form

The partnership form permits a group of members of the Bar who are specialists to associate themselves together in one organization. Then, to continue our analogy, the client with the tax case who comes to the partner who happens to be a real estate expert need not be sent out of the office; the attorney can either get the advice from his own partner who is a tax expert or he can introduce his client to that partner. There will be just one fee and that must somehow be shared by the two partners. System means a plan upon which the partners can agree, providing for the fair division of such fees. They will need to have certain records but the system can be built up from a very few original entries which the lawyers must make themselves; everything else can be done for them by clerical assistants.

The picture has been over-simplified. A firm is a great deal more than a number of experts working in water-tight compartments. All of the lawyers will be able to handle many types of cases that are common in general practice but there will be a steady trend for men to follow their special inclinations and aptitudes and more and more to devote themselves to a special part of the law and constantly to study that field and keep abreast of all new decisions, statutes, regulations, and rules that affect it. Inevitably, through years of application and experience, the specialist becomes more and more efficient and proficient.

The incidence of legal business, furthermore, is very uneven and is not always correlated to pure legal ability. Some lawyers by virtue of reputation, personality, friendships, connections, and similar factors have more work than they can handle; some lawyers have too little. Also it is a common experience that work tends to "come in bunches." In a partnership of reasonable size these inequalities can be evened out to a considerable extent provided the men in the organization will freely avail themselves of each other's time and skill. The system must encourage them to do precisely that; in fact it must reward them for so doing. When all the men feel that the system is fair to them and they can work happily together as a team, maximum output is achieved, the work is accomplished in the minimum amount of time, and the clients are well served.

Any vital organization, like an organism, is structurally one indivisible unit, but it is convenient to analyze it from different points of view and we shall use the following:

First, the client comes to the office.
Second, the lawyers work on the case.
Third, the organization around the lawyers.
Fourth, system and management.

I. THE CLIENT COMES TO THE OFFICE

The lawyer's office has to be as near as possible to the courts, governmental offices, other lawyers, the banks and business in general and it has to be accessible to clients. This means a central location and that entails high rent and rent is second only to payroll as an operating expense. But it is worth the price because it saves the lawyer's time and, as we shall repeatedly see, economy is basically a race against time.

Legal business is confidential; clients need to talk with the lawyer in a private office. The offices in a partnership necessarily consist of a series of private offices. So far as it is possible the firm should select space that can be cut up into fairly small economical unit offices without leaving a great deal of interior space that is dark. Good light is a godsend to anyone who works in a law office.

Also, so far as possible, the secretary or stenographer who works for a given lawyer should occupy an office immediately adjoining his. That saves many steps and much time. On a blue-print the "pool" or "kitchen" plan for handling stenographic work looks good. The stenographic force works together in a common room; when a lawyer needs a stenographer he presses a button which gives a signal and the girl who is not busy goes to his room. We have almost completely abandoned that plan. It ignores human nature and it is not efficient. If one or two girls are assigned to each attorney they become familiar with his work, his cases, and his clients. They know names and addresses without being told; they know how the letter should start (whether it is Dear Mr. Jones or Dear Bill) and they know how it should end (whether Sincerely yours, Very truly yours, Affectionately yours, or what not). These are not trifles. Clients, like all human beings, are sensitive on this score. A misspelled name can ruin the whole effect of an otherwise excellent letter. And it must not be overlooked that under modern conditions a substantial part of a lawyer's work is conducted by correspondence. A good secretary who becomes familiar with a man's work and his own method of work can save him an enormous amount of time. In fact it is like giving him two more eyes and hands and feet. Because he has only a limited amount of time, the lawyer, during office hours, should do nothing but practice law. Everything else that can be done for him should be. His secretary can keep his personal books, pay his bills, draw his checks, buy his railroad tickets, and so on. When a lawyer comes face to face with the actual cost of an hour of his time, he keenly realizes why he cannot afford to waste it.

By the same token a good telephone operator can save

Pirie MacDonald

REGINALD HEBER SMITH

a lawyer a great deal of time. She is more efficient because she becomes expert; if there are delays, the line is busy, or if a party has to be traced, let her time be used, and not the lawyer's, because hers is so much less expensive.

The Reception Room

Most of us dread going to the dentist. We forget that a good many people are timid about coming to a lawyer's office. A comfortable reception room, presided over by a polite and agreeable reception clerk does much to allay the feeling of fear. It gives to the client his first impression of the firm and first impressions are tremendously important, as hotel men have long since learned. The room need not be elaborate, but it must be clean, the newspapers and periodicals must be up to date, and a few fresh flowers which cost almost nothing add an encouraging touch that is especially appreciated by women.

It is preferable that the telephone operator should be in an adjoining but separate room. Then calls being put through are not overheard by those waiting in the reception room.

Attorneys leaving the office tell the reception clerk where they are going and when they expect to return and she gives this information to the telephone operator. Telegrams, messages, deliveries all come to the reception desk. A record is kept of every caller and of every delivery.

So far as the lawyer can manage it, clients and others should come to the office by appointment. Then the lawyer should keep the appointment punctually. When notified that the client has arrived he should go out to the reception room and personally escort the client to his office. At the termination of the interview he should again escort the client to the reception room and take his leave there. When people have to sit around drearily waiting their turn, the effect is altogether bad. We can easily become "case-hardened" and forget that most people come to us because they are in some kind of trouble or perplexity. If we can give them courage and reassurance from the moment they set foot in the office, we are doing a better professional job and also we are likely to save ourselves time. It takes longer to get the story from a person who is flustered or upset or angry than from one who has already been put at ease.

The telephone is indispensable but it can be a confounded nuisance. If a client is seated across your desk and as he tries to tell his story you are constantly interrupted by incoming telephone calls, he becomes annoyed. Also it is hard for you to give his problem your undivided attention. One device is to have the calls routed to the attorney's secretary. Often she can take the message; or she can take the number and agree to have the lawyer call back when free. Also, we do not hesitate to "cut-off" the telephone, instructing the operator to put through no calls but to take the numbers.

If, while the attorney is occupied with a client, someone else comes to the office to see him, his secretary goes out, takes the message if that will serve, or arranges an appointment at another time.

These matters may seem rudimentary. But organization means planning the routine of a case from beginning to end and the natural place to start is with the client and the best way is by putting one's self in his shoes and studying his feelings and reactions.

With the client (happily we trust) in the lawyer's private office, the "system" requires him to make out a New Case Report. If the lawyer wishes to avoid every appearance of formality or red tape he can make it out after the client's departure but it is simpler to make it out as the conversation proceeds because the printed form of the New Case Report affords the most convenient place on which to record essential data.

Office Memo of New Case

Naturally it includes the name, address, and telephone number of the client, and the same for the opposing party and his attorney, if any. A brief notation of the nature of the case is entered—whether it is a matter of litigation, a mortgage, a collection, a will, a tax return, etc. The lawyer also gives the case a title as short and descriptive as he can think of. This title he will use later in keeping track of his time. If, for example, the client John Doe wants to institute a suit for libel, the title of the case would be John Doe—Libel. If John wishes general advice it would be John Doe—Advice, and if he has been run over it would be John Doe—Accident.

The attorney enters his name as the person who received the case. He also notes whether the client is "his." Generally the client has selected him to come to and so it is his case. We call him, therefore, the "responsible attorney." He is in charge, he is responsible to the client and responsible to the firm. But he may have seen the client because a partner, to whom the client would normally go, is ill or out of town. In that event that partner's name is entered as the "responsible attorney."

If the partner wants another partner or an associate

to work with him on the case, he puts down his name in a space providing for such designation. He checks a square indicating whether the case is a "single" case or a "continuing" case. A single case is one that will come to an end, be billed, and then the office is through. A continuing case is one where a client retains the firm for general services year after year or where you make out a client's income tax returns every year. The significance of a continuing case is simply that Files and Accounts do not close their records when the case is billed but keep them open. In short, it avoids constantly reopening the same case. The attorney makes a check mark indicating whether the client is a "new" one or an "old" one—an old one being a client for whom the firm has done work before. Finally he enters a figure in dollars which is his estimate of the value of the case. This can be only an estimate or guess. The purpose and use of Estimated Values we shall see later in the third article. Since the New Case Report is a printed form the lawyer has very little writing to do to fill it out.

Files and Filing

The New Case Report first goes to Files (filing department). The case is given a file number, all names are indexed, and a file opened ready for the correspondence, memoranda, etc. that will soon begin to come in. The filing clerk initials the report showing that these things have been done, and passes it on to Accounts (the accounting department). In a smaller firm Files and Accounts can be merged. Accounts opens a ledger sheet for the client and case. Accounts is now authorized to make disbursements on proper vouchers and charge them to this case. Accounts also opens a Time Ledger Sheet for this client and case. As we shall see in the second article, the lawyers keep a record of the time they spend each day and the time spent on this case by anyone in the office will be posted to this Time Ledger Sheet. Accounts makes out Case Slips. These are small and on thin paper so that a number of copies can be made at one typing. A Case Slip goes to the "responsible attorney" and to any other lawyer assigned to work on the case, a copy goes to the reception desk, a copy goes to a master file of all cases in the office, and Accounts keeps a copy. The case slip contains in summary form the data on the New Case Report; client's name, address, title of case, opposing party, date received, the men who are to work on the case, and estimated value.

Finally Accounts lists the case on the Weekly New Case List which will be read and discussed at the next firm meeting. The accounting clerk, having done her part, enters her initials on the New Case Report which is then filed.

Each attorney has in his desk drawer a file of New Case Slips arranged alphabetically by clients' names, showing all cases for which he is the responsible attorney and all cases to which he has been assigned. Running through these slips from time to time is an excellent reminder and helps the lawyer to check up on himself and others who are working on cases with him to make sure that everything is being done that ought to be done in the client's behalf.

The client has come to the office. The mechanics of receiving and opening the case are over. The attorneys in the office are now ready to go to work for their client on the case he has entrusted to them.

(To be continued)

ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia (13th & Chestnut)	$3.50–5.00	$5.00–6.00	$6.00– 8.00	$12.00–25.00
Barclay (18th & Rittenhouse Sq. E.)		6.00	7.00–10.00	12.00–18.00
Bellevue-Stratford (Broad & Walnut)	All space exhausted.			
Benjamin Franklin (9th & Chestnut)	3.50–5.00	5.00–6.00	6.00– 8.00	12.00–14.00
Drake (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex (13th & Filbert)	3.00–3.50	5.00–6.00	7.00	
McAlpin (19th & Chestnut)	2.25–2.75	4.00	4.50– 5.00	
Majestic (Broad & Girard)	2.50–3.00	4.00–5.00	5.00	8.00–12.00
Manufacturers & Bankers Club (Broad & Walnut)	(Men only) 3.00			
Philadelphian (39th & Chestnut)	3.00–4.00	5.00–5.50	6.00– 8.00	9.00–20.00
Ritz-Carlton (Broad & Walnut)				10.00–12.00
St. James (13th & Walnut)	3.00		5.00- 6.00	10.00
Stephen Girard (2027 Chestnut St.)	2.75–3.25	4.50–5.50	5.50	
Sylvania (13th & Locust)	3.00-3.50		5.00- 6.00	10.00-12.00
Walton (Broad & Locust)	2.50–4.00	4.00–5.00	5.00– 6.00	8.00–12.00
Warburton (20th & Sansom)	3.00		5.00	
Warwick (17th & Locust)	4.50–5.50		7.00– 8.00	12.00–14.50
Wellington (19th & Walnut)	4.00		6.00	8.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

GUILTY!! — THEN WHAT?

Judge Examines Four Cases Where Society Could Have Been Protected by a Study of the Defendant's History

By Hon. Gudmundur Grimson
Judge, District Court, Second Judicial District, North Dakota

A YOUTH of twenty-one is before the Judge for sentence. He has pleaded guilty to the charge of breaking and entering a farmer's granary to steal four bushels of wheat, the proceeds of which he used to buy food. He is a stranger in the community and has no money and no one to speak for him. The prosecution knows nothing about him except the commission of the offense. The machinery of the Court is not provided with any means for scientific determination of what should be done in such a case.

Here is a human life just budding into maturity. He has violated the precepts established through the long experience of mankind for the protection of society. Why has he done this? Was there something lacking in the home that caused him to leave? Did not his community take the proper steps to care for and develop its best asset—its young people? Or was it the spirit of adventure that led him forth? What is his mental attitude? How will the action of the Court affect him? These and many other questions must necessarily go through the mind of a conscientious judge. He knows that the action he takes may make or break a human life. Yet with our present set up of penal administration no adequate means are generally provided for the investigation and determination of these matters.

In this case a thorough investigation would have revealed the offender a farm boy of good family and of good standing, with some high school training, no prior transgressions and no evil tendencies. He came from an ordinary farm community and had merely gone forth to try to make his own way in a world now somewhat closed to youth. He had fallen into bad company. His adventure with life had met misfortune. If ever a young man needed a sympathetic friend, he did! He was too proud to call for help from home, or even let his parents know.

Sentencing the Young Defendant

Without this knowledge of this young man or his background, without any further investigation, the Judge sentenced him to serve an indeterminate sentence of from one to five years in the penitentiary. Then, because of some slight infraction of prison rules he was not allowed to appear before the Board of Pardons until he had served two years' prison time.

What is going to be the effect on that young man? What the benefit to society?

Seventeen years ago, under similar circumstances and with a like background, Martin Tabert was summarily sentenced to ninety days in jail for stealing a ride on a train, and turned over to a lumber company under the system of leasing prisoners. In the swamp where he had to work he took sick, was unmercifully whipped because he could not work, resulting in traumatic pneumonia and death.

About twelve years ago, in his own community, but under similar conditions and apparently without any investigation or consideration of effect, John Dillinger was given a long prison term. Eight years later he was paroled on the strength of his standing at the time of the sentence, a matter that should have been considered before sentence was passed. During that prison term he trained with hardened criminals, but no investigation or consideration was given to that. The result was his murderous career thereafter.

Benny Dickson has now finished his criminal career. The press reported that in his first brush with the law his sentence was suspended. The next time he was paroled. Apparently he was allowed to go wild.

The result in the first case is yet in the making. The second did abolish the system of leasing prisoners in the United States, which was in reality worse than slavery. The third should open our eyes to the danger of forcing the association of the young unfortunates with hardened criminals. The fourth emphasizes the necessity of a properly supervised parole system.

Crisis Is at that Point

Constructive criticism has done much to improve our criminal procedure up to the time of sentence. The

(*Continued on page* 399)

HON. GUDMUNDUR GRIMSON

APPEALS IN CRIMINAL CASES*

By Mason Ladd
Dean, University of Iowa College of Law

The law is experiencing the results of an introspective era in which the legal profession throughout the country is examining particularly the procedure and administration of the law with the desire to improve it. Rules that were revered in the past as having almost a religious sanctity are being weighed to see if they perform their intended functions in the whole system of the law. Judicial councils and ministries of justice have been organized to study the effects of law in action to see whether the ends of law have been accomplished as judged by the needs of modern society. Important to the legal profession today and also to the public at large is the administration of justice as well as the existence of just rules. The establishment of judicial councils, advisory commissions, and the new administrative office of the United States Courts are all the product of the belief upon the part of the bench and the bar that a conscious effort should be made to make the operation of the judicial system more effective and efficient.

Comparison of Different Methods

In the furtherance of this work the National Conference of Judicial Councils is sponsoring the writing and publication of the Judicial Administration Series. The first book of this new series is written by Professor L. B. Orfield of the University of Nebraska, with an introduction by Roscoe Pound, on the subject of "Criminal Appeals in America." The book is timely, and collected materials upon the subject are needed. If judicial councils and advisory commissions are to perform their work in suggesting improvements in administration successfully, they should have before them the accumulated experience in appeals in the past and all of the various suggestions and plans for criminal appeals which have been heretofore considered. This book brings together what has been thought and written, what has been proposed and what enacted in respect to criminal appeals. There has been a great deal of writing upon the subject, but it has been widely scattered in law reviews, books and in the reports of committees. A wide range of ideas has been expressed, but there has been no attempt until this book to collect and present in one volume all of the accumulation of ideas and experience in criminal appeals. An examination of the footnote references shows the extensive inquiry and careful study which the author has given in compiling this material. The book represents a survey of the history and recent developments of the subject, and makes concrete suggestions for future action. It does not attempt to set up a detailed modern code of criminal appeals but rather discusses the substantive elements and objectives to be considered in formulating court rules or legislative action. There have been several excellent model codes upon the subject. The English Criminal Appeal Code of 1907 presented admirable rules controlling criminal appeals in England. In 1930 the American Law Institute Code of Criminal Procedure offered a plan of appeal representing the best American practice, and in 1934 the Supreme Court of the United States promulgated rules of practice and procedure after conviction in the federal courts which is the most recent model for criminal appeals. These three systems of criminal appeal have been extensively considered in this book, which presents an excellent comparative study.

Criminal Appeals in America, by Lester B. Orfield. 1939 Boston: Little Brown and Company. Pp. 305.

Townsend Studio

LESTER B. ORFIELD
Professor of Law, University of Nebraska

Should Criminal Appeals Be Abolished?

The debatable points on the problems of criminal appeals have been discussed at length. The chapter on the right to and the function of appeal is particularly interesting. To some the appeal of a criminal case affords but one more loophole for the criminal to escape penalty and be free to continue in the commission of crime. Many arguments have been urged in favor of the abolition of criminal appeals altogether. At the time the Criminal Appeal Act was passed in England, vigorous opposition was urged to it. Prior to this act of 1907 it was said that there was no such thing as criminal appeal in England although some form of review had existed for several centuries. Undoubtedly the public today becomes impatient with appeals in criminal cases reversing convictions on points which at least to the layman appear to be pure technical errors. The reversal and new trial operate as a spur to action from the standpoint of the criminal defense but the re-trial of a criminal case is exceedingly difficult from the standpoint of the prosecution. The length of time between the commission of the act and the time of trial along with the grapevine process by which the jury becomes aware of the fact that the Supreme Court has reversed a former conviction makes the second trial usually much harder for the state than the first.

It might be argued that the criminal trial is so intricately hedged with safeguards for the accused that

there can be no unjust conviction and that criminal appeals serve only to permit the criminal with money and smart counsel to escape justice. The author rightly takes the position that this is not true and that the right of appeal serves an indispensable part of a proper administration of justice. He argues, however, that the accused without financial means as well as the rich should be given the same security of a fair trial and protection by appeal. He would also favor more liberal provisions for appeal by the state except where there would be a conflict with double jeopardy. Indeed, it has been urged that the historical provision embodied in most constitutions against double jeopardy might not be regarded as applicable in a re-trial of the same case. This is reasoned on the theory that the principle of double jeopardy arose prior to the time when appeals were allowable at all and thus should not be confused with a re-trial of the same case because of the commission of error by the trial court. Furthermore, it is not totally unreasonable to regard the appeal of a case but a continuity of a trial below. However, it is pretty firmly established that the immunity of double jeopardy has been acquired by an acquittal of the jury. This, however, would not preclude appeals by the state on adverse rulings upon the indictment or other issues of law prior to trial and acquittal. A more liberal basis for appeal by the state would tend to eliminate what is sometimes the practice of trial courts in ruling for the defendant whenever in doubt.

Necessary for a Fair Trial

The book does not proceed upon the theory that criminal appeals are a necessary evil but rather it recognizes their importance in securing to the accused a fair trial, in maintaining consistent and uniform standards of trial courts and in developing the criminal law of the jurisdiction. Appellate court decisions even in states having only statutory crimes are a most important part of the body of the criminal law. If the use of an appellate court is important in civil law in securing justice between parties upon purely monetary or property issues, its function in preserving the rights of the innocent against unjust prosecution is all the more important where life and liberty are at stake. The task in the administration of justice is not to dispense with

(*Continued on next page*)

Guilty!! Then What?

(*Continued from page 397*)

legal profession, the press and the judiciary have all cooperated in abolishing technicalities, legalisms, quibbling, delay and shyster tactics. From the time a criminal is arrested to the time of sentence an adequate system for a full, fair and speedy trial is now assured in both Federal and State Courts. The light of publicity shines throughout these proceedings. While that publicity has often been abused the fact that all proceedings are in the open has been beneficial to the proper administration of justice. After sentence the only time publicity enters prison administration is in case of some abuse like the Tabert whipping or the recent case of the steaming to death of prisoners in an Eastern penitentiary.

All the resources of the State and National Governments are available to make a proper determination of the guilt or innocence of the accused. When, however, guilt has been established the efforts of government seem to end. The matter seems to pass into the private domain of untrained and often brutal prison officers.

At that point is exactly where the most solicitous care should begin. A finding of guilty is a finding that the accused is an ailing member of society. He should be so treated.

When a patient is brought to a doctor or a clinic the first determination is whether he is ill. Then all the resources of science are employed to find what causes the illness, and only when that is done is the treatment prescribed. Imagine what would happen if on the first determination of illness all were thrown into a hospital and given the same treatment! Yet, that is what is done with those found suffering from an anti-social ailment.

Looking for Causes

It is at that point that science should be called upon to determine the cause of the anti-social activity. Mental and physical examinations should be had, a study of home and environment made. After that an intelligent decision as to what to do with the offender can first be made.

The main object of the criminal administration is the protection of society. To that end two principal elements should be considered: What will best deter others from violation of the law and how can Society be best protected from further depredations by the offender?

The best deterrent to crime is a speedy trial and certainty of result. The best treatment of the offender is that which will in time return him to freedom a normal person, able again to take his place as a useful member of society.

Prison administration therefore becomes important. It should be in charge of men specially trained for that, just as a hospital is in charge of specially trained doctors, nurses and administrators. Dealing properly with the anti-social individual should be just as necessary a profession as that of dealing with the physically or mentally ill.

Classification of the offenders for proper punishment and treatment is just as important as the separation of the sick into different wards or sanitoriums. The habitual criminal who spends his time in prison planning his next depredation should be isolated and kept separate from the first offender, just as the one who suffers from a contagious disease is quarantined. It may be necessary to keep the habitual criminal always under restraint as we now keep the insane and feeble-minded. The first offender may soon be restored to normalcy and returned to society.

When a proper scientific study is made of an offender and the causes of his crime, an intelligent determination can first be made of how to treat him. When proper places of detention, and an intelligent force for administration thereof and for treatment of the offender are provided, then we can hope that such mistakes as the four cases cited and their consequent cost to society will be eliminated.

criminal appeals but to provide means by which they may better perform their intended function in the interest of justice and without disrupting the group interests of society as a whole.

Scope of Appeal

One of the problems extensively considered is the scope of appeal. Under the prevailing practice appellate courts, at least theoretically, consider only the commission of errors by the trial court. It is undoubtedly the thought of many laymen that if the Supreme Court affirms a conviction, that constitutes their statement that the accused is guilty; in the same manner it may be erroneously reasoned that if the Supreme Court reverses, the court must have thought the accused innocent. Of course, neither conclusion is true, with certain exceptions. It may, however, be questioned whether it would not be desirable for the appellate court in criminal cases to review facts as well as assigned errors. Mistake on facts may be even more prejudicial than mistakes of law. Where the appellate court is considering only errors of law, their decisions inevitably will appear technical. It is argued by the author that despite the difficulty of the problem they ought to review facts as well as law. Where there are intermediate courts of appeal perhaps they alone should review the facts and the court of final resort review only questions of law. The American Law Institute Code of Criminal Procedure does provide for a review of facts to determine their sufficiency to support the judgment. But under the English Act apparently the appellate court may consider new evidence, although the introduction of such is relatively rare. As a matter of fact, it is believed by the reviewer that appellate courts most generally do review the facts as well as the points of law. They must do so where a motion for directed verdict is an issue. They must do so also in considering whether an assigned error is purely a technicality and without prejudice, so that there should not be a reversal. Indeed, in many cases it is undoubtedly true that the appellate court is convinced of the innocence of the accused or the triviality of the offense on the facts of the record and searches for some error, technical or otherwise, upon which there may be a reversal. In one jurisdiction the appellate court had repeatedly warned without reversal of an undesirable instruction on reasonable doubt. Later an appeal was presented in which the same instruction was assigned as error and the factual record made the conviction doubtful although a motion for directed verdict had not been made. The court took this occasion to reverse upon the technical error in the instruction. It corrected the law, technically erroneous but not necessarily prejudicial, and in doing so accomplished the result of a review of the facts.

Oral Argument

Particularly interesting is the chapter on oral argument. The author has many suggestions, and reviews numerous proposals. He regards the oral argument as a remedy against one man opinions. He urges a study of the record and the briefs by the court before the time of argument. He would allow attorneys much more time in oral arguments and would like to have the court meet for consultation after the argument rather than wait until the argument has been forgotten or has grown cold. If the study of the record and the briefs were made prior to argument, then the decision could be reached and the opinion written while the argument of counsel and other members of the court were vivid in the mind of the judge. Furthermore, many decisions could be rendered without opinion where not required by statute and by very brief opinion in the majority of cases if a written opinion were required. The author's thought is that more time should be spent in arriving at opinions than in writing them, and that written opinions should be confined to those cases where they add to the development of the law.

DEAN MASON LADD

In the opinion of the reviewer, a very good job has been done in presenting a survey of all writings and experience in the field of criminal appeals. The book is very readable because of the simple pointed style of the author, who has attempted to present the material in a plain and practical way without elaboration or extreme statements.

Book Fairly Presents Both Sides of Many Problems

In his treatment of the subject he has presented both sides of the many problems with a fairness which should create respect for his constructive suggestions. It would be easy to write an exciting wholesale condemnation of criminal appeals or to be an advocate of some apparent but worthless panacea for the ills of criminal appeals. The author has attempted neither, but has rather in an analytical way carefully gone over all available material, presented the problems and suggestions so that courts, judicial councils or legislative bodies in considering improvements of the law will have before them a complete survey of the field with all references to the available literature on the subject. The book is full of ideas and is well worth reading. Roscoe Pound, formerly Dean of the Harvard Law School, in his able and scholarly introduction to the book states, "There need be no step in the dark in view

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Why Parole?

Parole with Honor, by Wilbur LaRoe, Jr. 1939. Princeton University Press. Pp. X, 295.

As everybody knows, one of the principal problems of the criminal law has always been what to do about repeaters. We can protect ourselves against the first offenders—it is the repeaters that are the real social headache. What can we do to protect ourselves against them? Can we, by any possibility, prevent there being any repeaters at all? We can—absolutely and easily. All we need to do is to line up all convicted offenders against a wall, and mow them down with machine guns. And our problem of second offenders would be completely and permanently gone. Fortunately or unfortunately, however, very few, if any, of us are sufficiently hard-boiled to accept any such solution, even if we are willing to stick to a penal system that imposes severer penalties, on the average, than does that of any other civilized country in the world. Nor are we willing to impose a life sentence for every offense. That being the case, a substantial number of our convicts are sooner or later going to come out again and for better or for worse rejoin society. As a matter of fact, about ninety-five per cent of them do come out ultimately, and resume contributing to society whatever of good and bad there is in their make-up.

95% of Prisoners Are Released Ultimately

Since that is the case, an intelligently organized society must be tremendously interested in how it releases these ninety-five out of every hundred. At the very least they face a period of adjustment, of catching-on again, that would be hard for the best of us and that may very well be far more important, in determining their future conduct, than all the preceding years of prison put together are. This fact of the enormous importance of the way we release our prisoners is the foundation on which Wilbur LaRoe's "Parole with Honor" is built. His effort is to have us use a little more intelligence in how and when we release, so that there may be the minimum of danger to the prisoner, and so to society, in the process.

Until fairly recently the normal punishment consisted in a fixed sentence, imposed at the time of the trial. No subsequent developments, no facts learned about the prisoner, could shorten or lengthen this sentence. He might be shown to be a safe person to release long before his time was up—no matter, he must stay locked up just the same. He might be shown to have so deteriorated in prison as to be a greater danger than ever—no matter, when his time was up he went free. What to do about this vicious dilemma takes up much of the opening chapter of the book. The answer, of course, is the indeterminate sentence, with the release date only decided on at a later time when it appears safe to release the prisoner. But such a release, even if only decided on after the most careful consideration, may turn out to have been premature. A check-up, in other words supervision after release, is needed to determine whether the prisoner, provisionally freed, should stay free. So supervision is a necessary part and parcel of the indeterminate sentence. But the converse is also true—the indeterminate sentence is a necessary part of real supervision. Why? Because supervision as a means toward making a man go straight will be effective only if it carries a punch, a threat, "if you don't go straight, you're going back to the pen." There is no such threat if a definite sentence has been served and finished. But this combination of indeterminate sentence and supervision after release is what we mean by "parole"—that *is* "parole."

Parole Does Not Mean Leniency

Mr. LaRoe insists, and rightly, that parole has nothing to do with leniency. The average length of time served for a given offense may be longer or may be shorter than previously prevailed under the fixed sentence laws. In Illinois (to cite the reviewer's home state) the time is usually longer. The public generally may not know this but offenders do. Here is an example: In this state rape still draws a definite sentence, set by the judge. Attempt to commit rape gets an indeterminate one, set by the parole board. If a man is tried on an indictment charging in one count a rape and in another an attempt and he sees he is headed for a sure conviction on the attempt he will always plead guilty to the complete rape. He knows which will mean the shorter time for him. No, parole need not, and in this state, has not, made for reduction in severity. That is why repeaters are invariably against it.

This is the gist of the opening part of the book. Its appeal for a parole system is not based on any maudlin sentimentality, on any indiscriminate siding with the offender and against society. Its appeal is to the reader's common sense. Drop all your emotion, the author asks, whether of pity or of vindictiveness, and judge parole simply on the facts. This being his approach, it seems that a more unfortunate title could scarcely have been chosen. The title "Parole with Honor" sim-

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of Professor Orfield's full presentation of what has been said and done and is to be said on every detail of the subject." The scope of the work may be seen from the title of the chapter headings which in order are as follows: History of Criminal Appeal in England, The Right to and Function of Appeal in Criminal Cases, Appeal by the State, The Scope of Appeal, Review of the Sentence, Delay on Appeal, The Appeal Papers, The Oral Argument, Bail and Stay of Execution, Appeal in Forma Pauperis, Technicality and Prejudicial Error, History and Organization of State Appellate Courts, Petty Criminal Appeals, Federal Criminal Appeals, Appeal Under the American Law Institute Code of Criminal Procedure, A Summary of Criminal Appellate Reform. Many excellent articles have been written upon the above subjects. These have been cited and their key thought expressed in the analysis and survey by the author. This is perhaps the greatest value of the book; that is, the bringing together of the thought which has been expressed on criminal appeals in their many aspects and also the comparative analysis of the leading legislation or proposed legislation upon the subject. Books of this kind do much more good in uplifting and improving the law than the writings sometimes seen condemning the law in all of its ways without even slight praise and yet offering no better means of disposing of the ills of society. The book is to be commended on its presentation of issues and ideas to be considered where improvement of criminal appeals is undertaken. Its assistance to judicial councils, legislative bodies and judges in the exercise of rule-making power should be of inestimable value in creating awareness of the many aspects of the problems and in using good judgment in making remedial changes.

ply reeks of the sob-sister. The man on the fence is alienated at once. Let it be said emphatically that in this sense the book and title do not fit each other.

Author Is Chairman of a Parole Board

Mr. LaRoe is the Chairman of the District of Columbia Parole Board. He knows his subject from practical, personal experience. And so it is with the vigor that comes from direct knowledge that he next takes up the defects—not in the basic idea of parole—but in its administration. The basic idea and the administration of that idea are two very different things. Those who have had active work in this field may be more convinced than ever of the desirability of parole, yet far more aware than the layman is, of defects in its administration. There is time here only to list a few of the principal ones. For example, there was "sun-down" parole—happily now disappearing—a false use of the word parole, whereby a prisoner was released on condition that before sun-down he must have left the state, with no inkling of his future whereabouts. Plainly this is no genuine parole at all, yet its inadequacies will be set in the score against parole.

Inefficiency in Parole Personnel Goes Along with the Politics

Another and widespread defect lies in our prevailingly entrusting the parole-granting authority to untrained, inexperienced, politically selected men. By the time that they have acquired an understanding of their complex job the political wheel has made a revolution and out they go. Personally the reviewer is not so greatly disturbed by the fear of corrupt influences being effective on them. This is not because he is merely an optimist. The defendant who can produce political or financial pressure will not wait until the parole board to put the pressure on. Nor even until his trial, for that matter. It is in the magistrates' courts and the municipal courts, where no one is looking and no one cares, that the fix is put in. The prisoner who could not do it then will not add to his power and wealth while he is doing time. No gang leader has ever added to his strength while he was locked up.

The next administrative defect—an even more serious one, as LaRoe points out—lies in the inefficient supervision provided for parolees. Here is work whose importance can hardly be over-estimated—nothing less than the possible saving or sinking of human lives—yet with few exceptions the selection of parole agents is purely on the basis of awarding political jobs. Training and aptitude have little or nothing to do with it—the expediencies of ward politics, everything. As if this were not enough, these inefficient workers are then given case-loads that even the best could not handle. Where 50 to 60 should be the absolutely highest number for any one agent to supervise, many carry as high as 200 and in one state a single supervisor has to watch no less than 500 parolees. This sort of thing is parole in name only. It is really release without supervision.

Releasing an Offender Only When He Is Fit for Release

These are only the most striking of the widespread defects in the administering of parole. The book presents others only a little less dramatic. These are the matters that we as citizens should concentrate on, and it is to educate us as citizens that this interesting and authoritative book has been written. If our democracies are to handle the problem of crime we must learn what Mr. LaRoe is able and willing to teach us, because parole is with us to stay. To stay? Why? Because so long as it is wise to release an offender when, and only when, he is fit for release, to watch and supervise him after that release to see if he is worthy, and to return him to prison at once if he is not—so long as that is wise we shall have parole, because that is what parole is.

E. W. PUTTKAMMER.
University of Chicago Law School.

Crime and Punishment in the Old French Romances, by F. Carl Riedel. Columbia University Studies in English and Comparative Literature, No. 135. 1938. New York: Columbia University Press. Pp. IX; 197. —Dime novels or modern tabloids have nothing on the old French romances when it comes to hair raising adventure or lilting love episode. For a feast of these romances as well as a scholarly study of their relation to the everyday life of thirteenth century France, F. Carl Riedel's study is recommended. The author, a graduate of Hamilton College and Columbia, now is teaching in the College of the City of New York.

Any legal student is sure to gain important background from the work. The lay man or woman may find it as interesting reading as lords and ladies found the original narratives.

The book is significant particularly because it is the first serious study of the subject of mediaeval crime and punishment as represented in these old French romances. Any one who read and enjoyed "The Clermont Assizes of 1665" translated from Abbe Flechier's "Memoires sur les Grands Jour d'Auvergne" by W. W. Comfort is sure to like this.

"From the romances read by and recited to courtly audiences," Dr. Riedel writes, "we can get not only an idea of the type of entertainment that lords and ladies enjoyed but also a notion of what they considered right and wrong, just and unjust. We can learn something of the fascination that wickedness in literary form had for them and even something of the technique that poets exercised in handling crime and criminals. We should like to follow the course of high-handed villainy and its dire consequences with as much interest as our forbears had in it.

"But there are times," he continues, "when our ignorance of twelfth and thirteenth century life, customs, and laws is not entirely enlightened by these narrative poems. We must turn to actual histories and to the actual laws of the age in order to complete our knowledge of what a mediaeval audience understood or took for granted."

The outline of Dr. Riedel's work is simple to follow. First he gives a concise review of the legal conditions of the period, then compares the romances with the actual law, and finally proceeds to a discussion of the social or moral aspect of the age, "since moral and legal classifications are rarely identical."

This discussion naturally leads him to the question of literary influences to see whether the criminals of the romances conduct themselves morally as self-sufficient individuals independent of plot or whether they are merely disguised stock types borrowed from other literary forms. He discovers, incidentally, that crime and punishment in the romances reflect actual procedures with a fair degree of accuracy.

In these present days of world upheaval the reader may take courage in the fact that modern society represents progress over thirteenth century France not only in legal procedures but also in moral responsibilities especially toward the fairer sex.

Kohler, Wisconsin. RUTH DE YOUNG KOHLER.

JUNIOR BAR NOTES

By Joseph Harrison
Secretary of the Junior Bar Conference

COMMITTEES reporting tangible accomplishment, increased state activities and regional meetings of Junior Bar officers highlight the monthly account of the Junior Bar Conference for the period covered by this article.

Early Returns from Judicial Administration Survey

The first returns from the Survey of Judicial Administration being conducted by the Conference in collaboration with the Section of Judicial Administration and the National Conference of Judicial Councils have been received. The reports deal with the status of the rule-making power in the various states, and are exceptionally complete and informative. They also indicate that the Survey has served to revivify interest in the recommendations proposed by the Section under Judge Parker's leadership in 1938. New impetus has been given to local programs of judicial reform by the facts the Survey has uncovered. One of the State Directors writes: "A review of the rules of court regulating procedure in the State of ——— reveals an alarming deficiency on that score in this state." Another report describes the situation in the inferior courts of the state and closes with these words: "Under the head of Inferior Trial Courts perhaps some mention should have been made of our Justice of the Peace Courts. However, it was thought that any intimation that they were governed by any rules at all—procedural or substantive—would be a little more than the expression of a pious hope."

In addition to narrative reports, which will be published in local bar journals, the Survey has secured by means of carefully prepared forms a great deal of detailed factual information, which serves as a control by which the conclusions of the reports can be tested. This is to be summarized and published in tables and maps which will give for the first time an accurate, comparative picture of the status of the Section's program in the various states. Part Two of the Survey, already in the hands of the State Directors, deals with Court Organization and Management. Part Three, shortly to be released, considers the use of pre-trial procedures.

A complete list of the Directors in charge of the Survey follows: Arizona, Ivan Robinette and Selim Franklin; Arkansas, Frank Pace, Jr.; California, Frederick Farr; Connecticut, Ralph C. Dixon; Delaware, Clair John Killoran; District of Columbia, Helen Goodner; Florida, Guy A. Race; Georgia, J. Alton Hosch; Illinois, Albert E. Jenner; Iowa, Thomas B. Roberts; Kansas, John H. Hunt; Kentucky, Andrew Duncan, Jr.; Louisiana, Oliver P. Stockwell; Maine, Richard S. Chapman; Maryland, Alexander Gordon, III; Massachusetts, Warren Reed; Minnesota, Matthew J. Levitt; Mississippi, James N. Ogden; Missouri, John H. Caruthers; Montana, Edmund T. Fritz; Nebraska, John M. Gepson; New Hampshire, Charles F. Hartnett; New Jersey, Charles B. Collins; New Mexico, Robert W. Botts; New York, John W. MacDonald, and James R. Flynn, assistant; North Carolina, Paul H. Sanders; North Dakota, James L. Kilgore; Ohio, Richard F. Stevens; Oklahoma, Kavanaugh Bush; Oregon, James Dezendorf; Pennsylvania, A. Sidney Johnson, Jr.; Rhode Island, John L. Pastore; South Carolina, Thomas B. Whaley; South Dakota, George J. Danforth, Jr.; Texas, William Burrow; Utah, The Honorable Byron L. Leverich; Vermont, Henry F. Black; Virginia, Edward S. Graves; Washington, Paul Fetterman; West Virginia, Harry Scherr, Jr.; Wisconsin, Clarence P. Nett; Wyoming, John S. Miller.

Maryland Activities

The Conference has been particularly active in Maryland. Since the first of January, 1940, over twenty-five platform addresses have been delivered in Baltimore City on subjects pertaining to civil liberties, administration of justice and juvenile crime prevention. A weekly radio program is being conducted over one of the local stations, W.F.B.R., on the last-mentioned and very important subject. To date, six addresses and interviews have been presented, with three more scheduled to take place. In addition the permission of the Superintendent of Public Schools has been procured to carry the Public Information Program into the high schools of Baltimore City. Local directors have been appointed in the City of Cumberland, Allegheny County, City of Hagerstown, Washington County, and the Township of Towson, Baltimore County, where programs similar to those now being conducted in Baltimore City are being planned. The activities are being conducted under the leadership of Herbert Meyerberg, of Baltimore, State Director of Public Information Program, and A. Risley Ensor, State Chairman.

First Manuscript in Restatement Annotations

In 1937-1938 a long range nation-wide program was set up by the Conference Committee on Annotating the Restatement of the Law. Under this program, committees to annotate the restatements have been or are being set up in all of the states in which there is an opportunity for the Junior Bar to participate in this work.

The Conference's committee chairman, Mrs. Mildred G. Bryan of Washington, D. C., has recently been notified by the American Law Institute that the first manuscript by a Junior Bar member since this program started has been completed and is now going to the publishers. Mose D. Lindau of Milbank, South Dakota, has completed the South Dakota Annotations to Conflict of Laws Restatement. We congratulate Mr. Lindau on his accomplishment. He is now undertaking the annotation of the Law of Restitution Restatement.

At present there are annotators or annotating committees at work in the following states, with the Conference workers as indicated: Alabama, Robert F. Proctor and Thomas W. Layne; Colorado, Stewart Shafer; Connecticut, Joseph P. Alishausky, Raymond H. Draget and Arno R. Vogt; Delaware, Caleb Boggs; District of Columbia, Helen P. Culhane and Max Tendler; Montana, Wesley W. Wertz and Emmet Glore; Nebraska, John Kuns; Nevada, Grant L. Bowen; New York, Ira Ball; North Dakota, Robert Q. Price; Oklahoma, Gordon L. Rainey; Oregon, Paul

L. Weiden; South Carolina, James F. Dreher; Utah, David Barclay; Virginia, Charles Killian Woltz; Washington, George T. Nickell; Wyoming, James O. Wilson.

Chairman Hannah's "Swing Through Democracy"

On March 23rd, one of the regional meetings of the Section on Bar Organizations was held at New Orleans. In line with the program of the Conference's Committee on Cooperation with Junior Bar Groups, this event was also made the occasion for a regional meeting of officers and active members of the Conference and other Junior Bar groups in the states represented at the scheduled meeting. Pursuant to action taken by the Executive Council of the Conference at Chicago last January, Chairman Paul F. Hannah attended the New Orleans meeting and took this opportunity to make stopovers in several states including localities where the Conference program has been lagging. Evidently, the trip had a two-fold effect: one, the stirring of interest at the points visited by Mr. Hannah; and two, it apparently inspired the Conference chairman. Captioning the report of his trip to the members of the Council, "Swing Through Democracy, March 19-29, 1940," Mr. Hannah wrote the following as a preface to his report:

> "One thousand miles from Washington, as the Boeings fly, lies New Orleans, over which have waved ten flags. Its Charles Street, stretching lazily through the new city, is by day a blaze of azaleas, blooming like the new freedom that has blossomed in Louisiana since the defeat of the Long machine. Its Canal Street by night is a blaze of light, in the shadows of which lies the Vieux Carré, whose ancient, shuttered houses with beautiful iron work porches form a sombre, dignified facade for the gayety of night clubs, bars, and famous eating places.
>
> "Between Washington and New Orleans, on the way South, lie Durham, home of Duke and Bull Durham; Charleston, home of the beautiful gardens; Savannah; Jacksonville; and Birmingham, the city of iron and coal. And between this "Paris of the New World" and the Capital of the Nation, on the way North, are Jackson, Mississippi, where the Confederate flag still flies on the Capitol grounds; Memphis, where one can have the Beale Street Blues, or stamp his feet in the Mississippi mud; Cincinnati; and Huntington, West Virginia.
>
> "This is a story of one who, going not as the Boeings fly, but as the crooked rails run, came some thirty-three hundred miles, saw and was conquered in the citadels of democracy.
>
> "In each of these diadems of the solid or near South, the general pattern was much the same: warm, generous hospitality; attractive, enthusiastic, young lawyers, deeply interested in the Junior Bar; a luncheon at which your Chairman spoke with keen awareness of the fact that no souls are saved after the first fifteen minutes; and a two or three hour conference with bar leaders to work out specific problems. Rich were the variations, however, from the general pattern. Each stop has a story of its own."

At Durham, North Carolina, the execution of the program of the Conference Committee on Law Schools was to be carried out this year by meetings and talks of interest at the three North Carolina law schools. An effective public information program over the radio and before civic groups was reported just completed at Durham. Similar programs are now under way in Winston-Salem and other cities. In Charleston, S. C., a proposed survey of problems of small litigants, particularly "loan shark" victims, was discussed. Progress in public information was in its early stages. Unauthorized practice of law, improvement of standards of admission to the bar, and public information engaged the attention of the Conference Chairman and the Georgia leaders of the Junior Bar who met him in Savannah. Membership work, under State Membership Chairman Don T. Carroll, and the Public Information Program which was to have the aid of a little theatre group in putting on radio sketches, were the principal subjects at Jacksonville. Legal aid, suppression of unauthorized practice of law, and legislative drafting bureaus were also discussed at the gathering. In Birmingham, former council member Peyton D. Bibb and other leaders of the Conference and the American Bar Association joined in discussions as to methods of meeting two of the prime problems confronting the young bar there, viz: economic difficulties and the collaterally related problem of promoting public confidence and good will for the bar. The possibilities of the Public Information Program were recognized as a proper and dignified medium through which these problems could be at least partially met. The matter of low cost legal service bureaus also was considered.

Window Exhibit at the Enoch-Pratt Free Library, Baltimore, Md., March 4-24, 1940.

Proceeding to Jackson, Miss., the chairman found that although no appreciable Conference activity had taken place there, interest was shown in the public information and legal aid aspects of our program. Memphis, with former Conference vice-chairman Robert W. Pharr as his host, was Mr. Hannah's next stopover. Here it appears that many of the younger lawyers have been given important responsibilities by the Memphis Bar Association. E. Pullen Jackson came from Nashville to discuss Conference activities and problems in that city with the chairman. Moving on to Cincinnati, Mr. Hannah found marked interest in the Public Information Program and legal aid work. The live Cincinnati Junior Bar Association has met with

noteworthy success in its own program. An activity that the local group has in common with the Conference and has carried out effectively is that of presenting a series of practice courses for young lawyers and law students. Plans were made to coordinate the radio time and material of the Conference's Public Information Program with those of other Ohio bar programs.

A particularly bright spot of the trip was the Huntington meeting, where the Chairman met the West Virginia Conference representatives. This heretofore comparatively inactive state is showing signs of new life and much promise for the future, under the leadership of State Chairman Amos Bolen. About twenty-five young lawyers greeted Mr. Hannah here. Concrete plans were made for carrying out the several activities of the Conference program. The following excerpt from the concluding paragraph of Chairman Hannah's report eloquently sums up an experience which promises to be of great value not only to the Conference but to the Association:

> "The trip constituted an inspiring opportunity to see the interest, idealism and enthusiasm of young lawyers everywhere and to enjoy that friendliness and fellowship which make the legal fraternity such a delightful one to which to belong. More than this, however, it reemphasized the tremendous responsibility on us who have assumed Conference leadership. The needs of the young lawyers are great; a strong national bar, able to serve the young lawyers in every aspect, offer solutions of pressing problems, to supply sound public relations and public information material, is a pressing need. The desire of the young bar to put its teeth into the public and professional problems, to "do something" constitutes a fountainhead of energy and intelligence waiting only to be tapped."

Because of space limitation, accounts of the New York regional meeting, New York City luncheons and membership work are held over.

Junior Bar Membership

In a report issued March 6th, Chairman Willett N. Gorham of the Conference Membership Committee points out that to date less than half the number of new members set as a goal for this year have been enrolled in the Junior Bar Conference. In some instances state quotas have been surpassed, while in others very little has been accomplished. It is important that all Conference officers and committee members as well as state and local membership workers intensify their efforts to have the younger lawyers of the country avail themselves of the opportunities of membership in the American Bar Association which, of course, is a prerequisite to membership in the Junior Bar Conference.

To Members of the American Bar Association:

We print below a membership application form for your convenience, in the event that you have a friend or associate whom you wish to propose for membership.

By special arrangement, applicants applying for membership during the remainder of the current fiscal year ending June 30th, who accompany their applications with a full year's dues ($8.00, or $4.00 if the applicant has been admitted to the bar less than five years), will be credited with the payment of dues to June 30, 1941 but will receive the perquisites of membership beginning May 1, 1940.

Application for Membership
AMERICAN BAR ASSOCIATION
1140 North Dearborn Street
Chicago, Illinois

Date and place of birth.....

Original admission to practice.....
State Year

Other states in which admitted to practice (if any).....

Bar Associations to which applicant belongs.....

.....
White ☐ Indian ☐ Mongolian ☐ Negro ☐

Name .....

Office Address .....
Street City State

Home Address .....
Street City State

Endorsed by .....Address .....

Check to the order of American Bar Association for $..... is attached.

CHISHOLM v. GEORGIA AND THE BRITISH CREDITOR

Plaintiff in That Case was a Citizen of South Carolina—Creditor of Whose Estate he was Executor Appears to Have Been a Subject of Great Britain—Did the State of Georgia Defend on This Ground?—Examination of Old Newspaper Files Suggested

By Our Washington Correspondent

A READER has called attention very graciously to what appeared to be an error, at page 171 of the February, 1940 issue of the JOURNAL, in the account of some of the Supreme Court's early records.

Our friendly critic notes that, at the page of the JOURNAL above mentioned, "reference is made to the case of *Chisholm v. Georgia* by stating that in that case 'the state complained against an attempt to make it a party to a suit by a British creditor.' This is incorrect in that the creditor was a citizen of the State of South Carolina."

It is quite true that the plaintiff, Alexander Chisholm, was a citizen of the State of South Carolina. The report of the case, at p. 430 (Mr. Justice Iredell's opinion), refers to its "being a suit against a state by a citizen of another state." And, at p. 419, it appears that he was a citizen of South Carolina.

Although Mr. Chisholm was the plaintiff, he was not the *creditor* in whose right judgment was being sought against the State. The title of the case shows this—*Alexander Chisholm, Executor of Robert Farquhar, deceased v. The State of Georgia,* 2 U. S. (Dallas) 419.

Dr. Warren's Authority

For the statement in the February JOURNAL, here under scrutiny, your reporter was indebted to Charles Warren through his 2-volume work, *The Supreme Court in United States History*. He was willing to accept that as authority; and still is. The expression therein was: "Thus, while complaining in the *Chisholm Case* because it had been made a party to a suit by a British Creditor, Georgia was complaining in the *Brailsford Case* because it had *not* been allowed to become a party in another suit by a British creditor" (vol. I, p. 103). Mr. Warren refers at another place, p. 93 of vol. I, to this being a suit "brought . . . by two citizens of South Carolina, executors of a British creditor, against the State of Georgia."

The element of chief interest at this point, of course, was the indication that the State of Georgia had taken inconsistent positions in the two cases, *Chisholm v. Georgia* and *Georgia v. Brailsford*. Perhaps the statements as made would be proved literally correct if it were shown merely that Robert Farquhar, the deceased principal in the *Chisholm case*, was a "British creditor." That is, the State of Georgia was complaining, in the *Chisholm* case, because it had been made a party to that suit; and it happened to be a fact that it was a suit by a British creditor. Whether the word "because," as used in the quotation speaking of the *Chisholm case, necessarily* carries more significance than this may be a debatable question.

A "British Creditor" in the Chisholm Case

However, your reporter, at the time of borrowing the idea from Mr. Warren, understood it to mean that the State of Georgia was taking the two inconsistent positions in that, so far as the *Chisholm case* was concerned, it was urging, as at least a part of its defense, that the creditor whose claim formed the basis of the suit was a "British creditor"—i. e., a resident, if not also a citizen, of some part of Great Britain.

There was involved in each of the cases the statute confiscating, or at least escheating to the State, property which had belonged to persons considered to have acted disloyally to the cause of the colonies during the Revolutionary War. There has been no question raised as to whether the *Brailsford case* involved a suit by a "British creditor." In fact, the report of that case states: "The bill set forth the following case: . . . Brailsford being a native subject of Great Britain, constantly residing there from the year 1767, until after the passing of the law: . . ." *State of Georgia v. Brailsford et al.*, 2 U. S. (Dallas) 402, 403.

A review of the official report of the *Chisholm case* has not disclosed any statement indicating whether the defense to the suit was urged, in behalf of the State of Georgia, that the creditor, Mr. Robert Farquhar, was British. It would seem reasonable enough, even though such defense were made, that the opinions by the different Justices would not mention it, lest it confuse the main issue of whether one of the States might be sued by a citizen of another State.

Loss of Old Court Records

Were it not for the loss, many years ago, of some of the old records of the Supreme Court, it should not be difficult now to ascertain exactly what grounds the State of Georgia presented as to why it should not be sued by a citizen of another State, for in the report of the *Chisholm case* we are told, at p. 419: "And now, Ingersoll and Dallas presented to the court a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause; but in consequence of positive instructions, they declined taking any part in arguing the question." p. 419. This "remonstrance and protestation" has been searched for diligently several times in recent years but cannot be found.

When we called upon Mr. Warren for help he was kind enough to give us references from his notes

taken in the preparation of his *Supreme Court in United States History*, and especially in respect to the statements, at the pages mentioned, regarding the cases of *Chisholm v. Georgia* and *Georgia v. Brailsford*. So far as we have been able to ascertain, there is available in Washington only one of these three early newspapers cited on the *Chisholm case*. That one we have examined and find in it mention of the creditor having "removed to Great Britain" and that he once was "a citizen of the State of Georgia." But we find no indication of whether the State urged his foreign citizenship as a defense before the Supreme Court, presumably in its "remonstrance and protestation," which we understand to have constituted a special appearance. From that paper, the *Salem* (Mass.) *Gazette*, we quote later; but, first, let us give the references on which we shall appreciate having historical aid.

Old Newspaper Files

These other two newspapers which Mr. Warren mentions as covering the facts involved in the case of *Chisholm v. Georgia* on page 93, of volume 1, of his history of the Court are: *Charleston City Gazette* of March 21, 22, 1793; and the *Augusta Chronicle* of April 20, June 15, 1793. The point of special interest is to ascertain whether the account of the *Chisholm case* in either of these newspapers shows that Georgia defended, in part, on the ground that the creditor, Mr. Farquhar, was a British subject. Mr. Warren does not say that any of the three references shows this point; but only that they cover the facts of the *Chisholm case* set forth on page 93 of his book. And it is *not* on page 93 where he refers to the apparently different positions taken by Georgia in the two cases; but this occurs on page 103.

From the Union Catalog Section of the Library of Congress, we find that the *City Gazette and Daily Advertiser*, of Charleston, South Carolina, issues from November, 1787 to June, 1810, are available at the South Carolina Historical Society, at Charleston (thus including the issues above mentioned, March 21, 22, 1793). And, from another source, we understand that some of the historical issues of this paper may be available at the Charleston Library Society.

The *Augusta Chronicle*, we are told, is available, in the issues mentioned (April 20, June 15, 1793), at the Georgia Historical Society, in Savannah; and perhaps also at the DeRenne Library, University of Georgia, at Athens. It may be that at the Georgia Historical Society, in Savannah, will be found also the issues of the *Charleston* (S. Carolina) *City Gazette* above mentioned.

A Local Search Is Asked For

Hence, the cities at which it is hoped we may find some kind-hearted persons willing to aid us in our pursuit of this elusive essence called history are: Charleston, South Carolina; Savannah, Georgia; and Athens, Georgia. And the point to be resolved is whether Georgia urged as a defense to the *Chisholm case* the foreign citizenship (or residence) of Farquhar, the creditor, whose executors, residents of South Carolina, were seeking relief from the State of Georgia in this original action in the United States Supreme Court: *Chisholm v. Georgia*, 2 U. S. (Dallas) 419.

Be it understood that we do not consider this point in and of itself to be of tremendous significance: although, once it is raised, it does seem to have some historical interest. But the refreshing of memories in respect to this famous *Chisholm case*; the following of the logic of erudite judges and counsel; and a renewed appreciation of those early days of the Constitution's development all seem to give point to the research which this inquiry has provoked and yet may generate.

The third of Mr. Warren's citations for the facts respecting the *Chisholm case* was the *Salem Gazette*, issue of March 5, 1793. This weekly newspaper we found in the Rare Books Section of the Library of Congress. It contained a good account under the date line "Philadelphia, Feb. 19," and with the heading "Important Decision." The part here quoted, in addition to the elements above pointed out, seems of peculiar interest in two other respects; viz., in showing that Farquhar, the creditor, was not the person whose acts had been "inimical to the cause of liberty in the United States" but that such persons were two former partners of his; and further in its showing, without comment, of the United States Attorney General serving (outside his official capacity, of course) as counsel for private litigants in a suit against one of the States. That account stated in part:

". . . The Attorney-General, Mr. Randolph, was employed on behalf of executors of a citizen of the State of Georgia, who had left America previous to the revolution, and removed to Great Britain after settling a partnership account with two partners in trade, and whose bonds he took for the balance due him. After his decease, his executors on making application for payment, found that those two persons who had given their joint bond, had been inimical to the cause of liberty in the United States; and that their property was confiscated: the executors alleging that the bond was given previous to the revolution, applied to the State of Georgia for relief."

Southern Papers Please Copy

The references given by Mr. Warren for the facts, in *Georgia v. Brailsford*, appearing on page 103 of his *Supreme Court in United States History*, were: the *Charleston City Gazette* of April 3, 1793, copying the *Augusta Chronicle* of March 16, 1793; and the decision of the Circuit Court by Justice Iredell, in the *Gazette of the United States* of May 16, 1792. It will be noted that these sources are given as references only for the facts of the *Brailsford case*, in respect to which no inquiry now is suggested because, as stated, it appears in the report of that case in the Supreme Court that the creditor, Brailsford, was British and that the State of Georgia presented this point.

However, it would seem that contemporary accounts of the *Brailsford case* may have mentioned any inconsistency which existed in the positions the State of Georgia was taking in the two cases since the *Chisholm case* was in process (the marshal's return on the summons having been made July 11, 1792. 2 Dallas 419) when the Judges' opinions in the *Brailsford case* were delivered, August 11, 1792. 2 Dallas 404. Especially does it seem reasonable that some comparative mention of the two cases might be found at the sources next above shown since it is at page 103 of volume I of his work (rather than at page 93 to which the citations were given by him for the facts in the *Chisholm case*) where Mr. Warren recounts this element of apparent inconsistency.

Position Taken By Georgia

It is not seen exactly how the State of Georgia could have made a different or stronger point (as to why it should not be sued) based on the foreign citizenship of the creditor in the *Chisholm case* than its point that it could not be sued in the Supreme Court merely because

(*Continued on page* 412)

SOUTHERN STATES HOLD REGIONAL CONFERENCE

Atlanta Meeting Draws Representatives from Alabama, Florida, Georgia, and North and South Carolina—Discussion of Cooperation of Press, Radio and Bar—Unauthorized Practice Problems Have Place on Program—Legal Education, Legal Institutes and Bar Organization Also Discussed

A HIGHLY successful Regional Conference of State and local bar association executives, together with members of the House of Delegates of the American Bar Association, was held at the Ansley Hotel in Atlanta, Georgia, on Saturday, Feb. 17, 1940. The meeting was attended by representatives of local and state bar associations from the States of Alabama, Florida, Georgia, North and South Carolina, representatives of various committees of the American Bar Association, and members of the Junior Bar Conference. The meeting was under the auspices of the Section on Bar Organization Activities of the American Bar Association.

Raymer F. Maguire of Orlando, Florida, as Chairman of the American Bar Association section in charge, presided over the sessions, which were designed to increase the utility and efficiency of state and local bar associations by investigating, discussing and recommending means and methods of strengthening such associations, coordinating their activities and increasing their capacity for service to the legal profession and the public.

Legal Education and Bar Admissions

John J. Danhof, a member of the Committee on Legal Education and Admissions to the Bar, discussed the work of his committee, which is to improve the standards of training and admission to the bar and to secure the cooperation of bar examiners, law schools and bar associations in the various states to that end.

It is the considered opinion of the committee that bar examination questions should be based upon general law and not almost entirely upon the local state supreme court decisions and state statutes of the particular state in which the examination is being held. Cooperation between bar examiners and the deans of law schools in the drafting of examination questions has been found to be most helpful in giving the applicant a fair examination and one which tests his general knowledge of the law.

Dean Hilky of the Emory University Law School criticized the manner in which bar examinations are held in Georgia, pointing out that the examinations were held in the thirty-three different circuits of the state rather than at a central point, and that only one day was allowed for the examination, with fifty questions to be answered in one day.

Richard T. Rives, President of the Alabama State Bar Association, reported that Alabama has adopted all of the recommendations of the American Bar Association as to admission to the bar, with the exception that graduates of the University of Alabama are admitted to practice without examination. Alabama requires two years' college work in academic studies, followed by three years in an accredited law school, or four years in a law school not accredited, as a prerequisite to taking the bar examinations. The examinations last three days. The Dean of the University of Alabama Law School is a Member of the Board of Law Examiners, and there is a high degree of cooperation between the bar examiners, the bar and the law schools.

Press, Radio and Bar

Giles Patterson of Jacksonville, Florida, made a most interesting talk concerning the activities of the Committee on Cooperation Between the Press, Radio and Bar, in the course of which he outlined the history and origin of the committee. The committee was an outgrowth of the famous Hauptmann trial. It was organized at the 1936 convention of the American Bar Association, largely the result of suggestions of Newton D. Baker. Mr. Baker was made Chairman of the Committee, and although it was recognized by the committee that by the exercise of the rule making powers of the courts, or by state statutes if necessary, such matters as the use of cameras and microphones in courtrooms during trials could be regulated, it was the sense of the committee that these matters should be worked out in cooperation with representatives of the newspapers and radio. Therefore, at the request of the President of the American Bar Association, a Committee of American newspaper publishers and a Committee of American newspaper editors were appointed to confer with the American Bar Association Committee, and a joint meeting of the three committees was held in New York in 1937. The purpose of the conference was to work out an agreement between all interested parties as to the practices of the press and radio in connection with court trials. The representatives of the press admitted that these matters were within the power of the trial courts to regulate and were willing to trust them to the regulation of the trial courts. However, members of the bar association committee felt that many judges, being elective, were subject to pressure on the part of the press, and that the leaving of these matters to the discretion of the individual judges would place the judges in an embarrassing situation.

Mr. Patterson reported that the results of these conferences were to reach an agreement in all respects, except the right of the press to use cameras in the trial courtroom, as to which no agreement could be reached. While these committees were still attempting to reach an agreement on practice, the Committee on Professional Ethics proposed Canon 35 of professional ethics at the convention of the American Bar Association in Kansas City, and Canon 35 was adopted before the Committee on Cooperation Between the Press, Radio and Bar became aware of the proposal. This move almost resulted in the dissolution of the committees of the publishers and editors. After considerable difficulty, the American Bar representatives have succeeded in continuing the conferences, with the radio people also being represented. These conferences are still continuing, according to Mr. Patterson, and it is the hope of his committee that an agreement will be perfected.

In the discussion which followed, Sylvester Smith pointed out an interesting fact concerning the Hauptmann trial, which is not generally known. During the Hauptmann trial, according to Mr. Smith, the sheriff sold front row seats in the courtroom to the public at so much per seat. When the sheriff came up for reelection, his opponent used this action as campaign ammunition, and the sheriff was defeated.

John L. Tye, of Atlanta, Georgia, brought out that a few years ago the newspapers in Atlanta made a habit of publishing the names of plaintiffs' lawyers when they secured particularly large judgments, or collected unusually large fees. Through the efforts of the Georgia bar, this practice was discontinued.

Public Relations

Sylvester Smith of Newark, New Jersey, Chairman of the Committee on Public Relations of the American Bar Association, outlined the work of his committee. The committee, since its inception, has made a study of how large and successful business enterprises, such as the American Telephone and Telegraph Company, and other organizations such as the American Medical Association and the American Dental Association, have handled the matter of public relations. These studies have brought the committee to the conclusion that it is necessary, first, that lawyers become acquainted with the organized bar, local, state and national, and its work; secondly, that they become members of the great organized legal profession; and, thirdly, that the organized bar work through national, state and local units, in studying the problem of what is wrong with relations between the bar and the public, and carry on a program to improve those conditions.

Through the weight of such an active organization, pressure could be exerted upon those sources which, from time to time, intentionally or unintentionally discredit the legal profession. For example, Mr. Smith pointed out, certain movies have pictured the profession in an unfavorable light and through such a committee as the Public Relations Committee the organized bar can bring pressure to bear on the representatives of the film industry to see that such adverse impressions are not repeated.

In the general discussion which followed, it was brought out that the Atlanta Bar Association had sponsored the publication of advertising in local newspapers of a high type, having for its purpose the improvement of relations between the legal profession and the public, and the Orlando Bar Association has staged radio programs of the same nature. In every instance care was observed to see that no individual lawyer was mentioned, and that the Canons of Ethics regarding personal advertising were not violated.

Work of American Bar Sections

President Charles A. Beardsley of the American Bar Association, in the course of his remarks concerning the functions of the various sections of the American Bar Association, took occasion to express the view that the lawyers can best foster better public relations by taking the initiative in instigating reforms in the administration of justice, so that the administration of justice will be more efficient and more economical. He called for unification of lawyers in bar associations, saying, "We must pool our interests and direct our forces toward the goal of better public service; together we can give that service and indirectly we can improve our standing with the other people that go to make up society—we can improve our public relations." Such reforms are assured of a favorable press, and the backing of public opinion.

President Beardsley divided the sections of the American Bar Association into two groups, which he called the "Bread and Butter Group" and the "Pro Bono Publico Group." He pointed out how membership in the first group could be of real service to the lawyer, but dwelt at greater length on the "Pro Bono Publico Group" which he defined as "those sections dedicated mainly to public service." These are the sections devoted to improving the administration of justice and constitute real public service without the prospect of immediate gain to the lawyers. However, the speaker pointed out that in the long run the elimination of delay in the administration of justice would increase the business of lawyers and decrease the resort by business men to arbitration groups to avoid resort to the courts.

Chairman Maguire called upon representatives of the various state associations present to outline their organizations. The discussions which followed of the various types of state bar organizations, and the experience with these various types, were very valuable to the delegates present. To the writer, the model state organization is that of Alabama, which was described by Richard T. Rives.

Alabama the First Integrated Bar

Alabama was the first state to form an integrated bar, this being formed on August 9, 1923. Its governing board is a Board of Commissioners consisting of twenty-four commissioners, one from each Judicial Circuit in the state. The lawyers from each Circuit elect one of their number to serve as a commissioner on the Board of commissioners. The officers consist of a president, first and second vice-presidents, and secretary. The president is elected at the annual meeting and serves ex officio on the Board of Commissioners.

The Board of Commissioners has broad and extensive authority. Among other things, it controls

admission to the bar, and employs a prosecuting attorney to prosecute lawyers charged with unethical practices.

Insofar as admission to the bar is concerned, the Board prescribes the qualifications for admission, subject only to a state statute, and is subject not even to the control of the State Supreme Court. It appoints the Board of Examiners and appoints the Fairness and Fitness Committee.

Up until the time this organization went into effect, no lawyer had been disbarred for a generation in Alabama for unethical practice, because he was allowed a jury trial. Since that time, lawyers charged with such practice have been tried before the Board of Commissioners. Since the institution of this integrated bar, thirty-five lawyers have been disbarred. How the defendant may have fared at a previous criminal trial in the courts on charges growing out of the alleged unethical practice, has no bearing on his case before the Commission. The speaker cited one case of a lawyer who had successfully defended himself on a perjury charge in the courts before appearing before the Commission, but he was nevertheless disbarred by the Commission.

Financing Bar Activities

The activities of the Alabama State Bar are financed through a state license fee of twenty-five dollars paid by each lawyer in the state, ten dollars of which amount goes to pay the expenses of the state bar. During the past year the Alabama Legislature raised the amount which the state bar is to receive out of this license fee to fifteen dollars, and these additional funds have enabled the organization to broaden its activities and to employ a proctor who is delving into the subject of unauthorized practice in the State of Alabama. It has also enabled the state bar to hold legal institutes, which they have found to be a wholesome influence. In addition, the bar association publishes a state bar journal, carrying news of activities within the association.

Legal Institutes

President Dan A. Redfern of the Florida State Bar Association discussed the valuable part that legal institutes have played in increasing interest in the Florida State Bar Association and in increasing its membership. The inspiration for these legal institutes in Florida was received from the previous conference of local and state bar association executives sponsored by the American Bar Association in Atlanta the year before. He outlined the manner in which these legal institutes were staged in Florida, without cost to the Florida State Bar Association. The speaker stated that as a result of the efforts of the Florida State Bar Association, legal institutes have been held in every circuit in the State of Florida with the exception of the Fourth Circuit, and that the Jacksonville Bar Association was staging a legal institute on taxation the following week in that Circuit. These legal institutes resulted not only in a substantial increase in membership in the Florida State Bar Association, but also in the formation of local bar associations in two or three circuits in the state which previously had no organized association. Mr. Redfern stated that the Florida State Bar found it necessary to organize these local bar associations in connection with its plans for putting on legal institutes in those circuits.

Unauthorized Practice

The final discussion was led by Henry Brennan of Savannah, Georgia, a member of the Committee on Unauthorized Practice of Law of the American Bar Association. This committee furnishes information to over 430 local committees on unauthorized practice and publishes each month a pamphlet entitled, "Unauthorized Practice News."

His committee has opposed general legislation attempting to define the practice of law, finding that where this was attempted various lay groups have had enough influence to get themselves excepted from the definition. For this reason the committee advocates leaving the definition of the practice of law to the courts.

It is the policy of the Committee to avoid litigation except where it is clearly shown to be in the public interest. It has been found that conferences with offending groups and a frank discussion pointing out the injury to the public of the objectionable practice is usually sufficient to cause the offending group to discontinue such practice.

Agreements have been worked out between the Committee and the General Board of Life Insurance Underwriters, and the National Conference Committee of Insurance Adjusters, which have tended to decrease greatly the unauthorized practice of law by persons in these groups, and the trust division of the American Bankers Association has been very cooperative in using its influence to stamp out objectionable practices on the part of trust departments in banks.

Mr. Brennan stated that his committee is always ready to offer advice and counsel to all local committees in connection with unauthorized practice, and that where litigation was necessary his committee was always glad to furnish authorities and make suggestions as to pleadings.

With reference to various governmental bureaus and agencies allowing persons not licensed to practice law to practice before them, Mr. Brennan stated that the O'Toole Bill was before Congress, which bill was designed to prohibit everyone except licensed attorneys appearing before these boards and agencies. He stated, however, that his committee opposed any general legislation because of the pressure of lay groups being likely to secure exceptions in the law in their favor, and stated that his committee was carrying on negotiations with the Treasury Department, Board of Tax Appeals, and Interstate Commerce Commission with reference to amending their rules to allow only licensed attorneys to practice before these bodies. He stated that the members of these boards and agencies have experienced the difficulty of having lay practitioners before them, and are tightening their rules every year.

That evening, following the conference, a formal dinner in honor of President Beardsley was given in the Ansley Hotel under the sponsorship of the Atlanta Bar Association and the Lawyers Club of Atlanta.

DEAN BOGGS,
Jacksonville Bar Association.

Government Counsel and Their Opportunity*

By Hon. Robert H. Jackson

Attorney General of the United States

ALMOST exactly six years ago I arrived in Washington to become General Counsel for the Bureau of Internal Revenue. Promising myself and my clients that it was for a year only, a good deal bewildered at the size and complexity of the government machine, I joined the ranks of government counsel.

The Federal Bar Association promptly extended a hospitable hand. In it I found men and women who entered the Government service under many different administrations, who are divided in political affiliations, in social viewpoint, in race and in creed. They are, however, in two things united—in devotion to the Federal legal service and in maintaining for that service the best ideals and traditions of our profession.

That spirit has been increased by the leadership of your distinguished toastmaster, with whom I worked in the field of legal organization long before I thought of entering government service.

Your invitation to speak tonight was extended to the Solicitor General of the United States and, as such, I accepted it. Lawyers know that office as one of the few in government where one's energies may be devoted to the philosophy of the law, and to court room advocacy, without having his mind constantly littered with administrative detail. Of course, the title gives the public some difficulty in understanding the function of that office. A high school girl in Kansas recently wrote to me that her class was making a study of the Department of Justice, and she asked me to send her "all available free material on soliciting in the Department of Justice." Any humiliation from this incident was overcome a short time later when a niece of one of your members wrote home about her visit to Washington and referred to me as "the Celestial General." From such a pinnacle, a mere Attorney Generalship would be a demotion. I congratulate government counsel throughout the service that Francis Biddle, a lawyer known to many of them, and familiar with the problems of government, has been willing to leave a lifetime Judgeship to become Solicitor General. That reveals the esteem in which he holds that office—an office which involves the greatest professional opportunity and intellectual satisfaction of any in all the Government.

I accepted your invitation gladly, not merely because the invitation is in itself a compliment, but also because I was told that we would unite in honoring, as the guest of the evening, Mr. Justice Stone. Those who seek to combine high professional standards with public service could find no more inspiring example of each than in our guest tonight.

Harlan Stone would have become a great lawyer even if every law book in the world had been burned the day he was born. Underlying his scholarship is a fine native sense of ordered relations among men, of proper balance between property rights and personal rights, and of what is just and square in a work-a-day world. He is understanding toward the mistakes and weaknesses of his fellowmen, and is impatient only of evil purpose or of bad workmanship. He shares wholeheartedly the democratic aspirations that have produced our great American experiment in government by the consent of the governed, and his service on the Supreme Court will be remembered for its statesmanlike as well as for its lawyerlike contributions to our constitutional development.

When I undertook to speak tonight, not being gifted with the foresight of a columnist, I did not know that I was to become his remote successor in the Attorney General which he filled with such distinction.

It is not too much to say that he took it over at a time when the country felt actually unsafe because of the misuse that had been made of its powers. Happily no successor of his has ever had a problem comparable to that which faced Harlan Stone. He cleaned house and accomplished a quiet regeneration of the Department of Justice. He reorganized the Federal Bureau of Investigation, put it on a professional basis, and properly confined its activities to investigation of violations of federal law. He brought into the service of the government clean, energetic, and non-political lawyers, many of whom are with us still. Moreover, it is interesting to note that in some respects he anticipated the New Deal. For he recommended in 1925 four Crime laws which did not become law until, in 1934, they were enacted by the 73d Congress, as a part of the Crime Control program of this administration.

The rank and file of the Department cherish affectionately the tradition of an informal, democratic, easily accessible, kindly, and understanding Attorney General. He went into court frequently and personally took the heat of the opposition, because he had a deep devotion to court room work and to the development of the philosophy of the law which is the underlying function of advocacy. It is good for one's humility to engage in this personal advocacy. Every advocate knows within himself how inadequate is his performance compared to his opportunity—for he knows that his actual argument is never the stirring thing he planned, nor is it ever equal to the one he thinks of the night after. Attorney General Stone inspired his staff by example and by generous credit to those fellow workers on whom the record of every executive must so largely depend. It has been said that he regarded none of his lawyers as subordinate, but all as associates.

In this weird city, where so many are making speeches and so few listen to them, you may have overlooked a great speech by Mr. Justice Stone, which, both as a tribute to our guest and as an inspiration to our bar, should be republished in your excellent Journal [*the Federal Bar Journal*].

He welcomes searching criticism of our cherished professional ideals and traditions, including that of our leadership in public affairs, because to no other group in this country has the state granted comparable privileges or permitted so much autonomy. As

*An address at the Twentieth Anniversary Dinner of the Federal Bar Association, Washington, D. C., January 20, 1940.

victims of changes in economic and social life of whose nature and effect we are still not wholly aware, he says our need is not merely to focus our attention on petty misconduct in the disreputable outer fringes of the profession. Instead he goes to the root of the matter and shows that most of the mistakes and major faults of our time are to be ascribed to a failure to observe the fiduciary principle, old in equity and recognized by law—the principle of trusteeship, without which our kind of society cannot permanently endure. The lawyer in America, as he points out, has reached his highest position in public esteem in dealing with public questions which have become identified with forms of legal right, such as the historic controversies, out of which grew our Bill of Rights. He demands with earnest eloquence a fresh and active devotion on the part of men who wield power to the principles that govern trusteeship.

Justice Stone has thus summoned the bar to an old and exacting standard, but one entirely practical and attainable for government counsel. Every lawyer, true to his profession, dwells constantly in a climate of confidence and of trusteeship, and in the daily admonition of law and of tradition that he must serve no end that conflicts with his trust. I have never hesitated to be a critic of my profession. Its performance of its social obligation is sometimes pretty bad. But it remains true that no group can show a record of higher average fidelity to its trust. Indeed it is probable that both the private and the government bar more often err on the side of overzeal than on the side of betrayal of trust.

We lawyers, who sit temporarily in the position of government counsel, are subject to admonitions to duty in office that those outside of the profession never knew to exist. To every one of us, our standing among our professional fellows, our name among lawyers who are our most severe, yet most fair, judges, is a fixed asset compared to the volatile values of politics. And a lawyer's standard includes not only zeal to protect the interests of government, but also respect for the legitimate rights of adversaries. One of my able predecessors in the Solicitor Generalship reminded us that government does not lose any case if, by its result, justice is done. Mere statistics of success form no criterion by which to judge government counsel. Fundamental things in our American way of life depend on the intellectual integrity, courage and straight thinking of our government lawyers. Rights, privileges and immunities of our citizens have only that life which is given them by those who sit in positions of authority.

In all of our doings there is of course a great difference between the mere belligerency and bluster that used to be the court room manner of the lawyer and the dispassionate pursuit of justice which our modern manner calls for. But government counsel is not required to be dull in order to be temperate, nor is he required, in devotion to the ideals of his profession, to be so afraid of public movements and the intellectual or political currents of his time that he fears to indorse anything—except his pay check. We are citizens as well as lawyers.

Woodrow Wilson would deserve immortality had his only public service been to speak these lines:

> ". . . Every man who takes office in Washington either grows or swells. . . . The mischief of it is that when they swell they do not swell enough to burst. . . . But the men who grow, the men who think better a year after they are put in office than they thought when they were put in office, are the balance wheels of the whole thing."

No place in our profession offers greater opportunity and urge to grow than the legal service of the government. In any of the departments, in the special agencies, in the Department of Justice the daily tasks well done will soon make one a person of special authority in his line. The volume of experience, the intensity of it, the sheer pressure to explore special problems can hardly fail to make faithful government counsel, however humble his beginnings, outstanding among the competent men of his time.

A large, and able, and respected private bar is engaged in the work of moulding the law slowly but steadily in the private interest. In its pleas and strategy it puts strong pressure upon courts and administrators to develop the science of law in the direction of extension of private rights. The response to that pressure must be exerted by us. We must guide the processes of our courts in the direction of the public interest if we are to avoid a one-sided evolution of the law.

We lawyers must at times risk ourselves and our records to defend our legal processes from discredit, and to maintain a dispassionate, disinterested, and impartial enforcement of the law. In spite of any temporary passion or hysteria, I have an abiding faith in the fairness and discernment of the sober second thought of the American people. We must have the courage to face any temporary criticism until this judgment arrives. The prestige of the law and the moral authority of our legal process rests upon their disinterestedness and impersonality. These ideals that we, as Americans, hold most dear are much a trust in the hands of government counsel. We will keep the faith.

Chisholm v. Georgia

(*Continued from page 407*)

the plaintiff was a citizen of another State of the Union. Perhaps the reason for presenting the foreign citizenship issue (if there was any special reason for doing so) will appear at the same point where reference is found to the apparent inconsistency of the State's positions in the two cases. The Constitution seems to place "citizens of another State" and "citizens or subjects" of "foreign States" on exactly the same basis in respect to cases "between a State" and themselves. It says:

"The judicial power shall extend . . . to controversies . . . between a State and citizens of another State; . . . and between a State . . . and foreign States, citizens or subjects.

"In all cases . . . in which a State shall be party, the supreme court shall have original jurisdiction." United States Constitution, Article III, Section 2, parts of clauses 1 and 2.

To those for whom the historical learning of their youth may have been dimmed by the later onrush of other important events, it is recalled that the Supreme Court's decision in the *Chisholm case*—permitting a suit by a citizen of one State against another State—was what provoked adoption of the eleventh Amendment, effective January 8, 1798, providing that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

ARIZONA USES FEDERAL COURT PRACTICE AS MODEL

Supreme Court, Given Rule-Making Power, Adopts Practice Code Patterned on Rules of Civil Procedure for District Courts—First State to Follow This System—Code of Criminal Procedure Also Adopted

By Hon. Alfred C. Lockwood
Judge, Supreme Court of Arizona

THE first legislature of Arizona in 1864 adopted short but comprehensive codes of criminal, probate and civil procedure. Our courts have tacitly from the beginning, and specifically of recent years, held that the final authority to regulate not only substantive but procedural law was in the legislature. As a result, all procedural changes up to 1939 have been based upon the advice of the code commissioners, who from time to time have revised our statutory law, as modified by the individual opinions of lawyer members of the legislature. We have, therefore, had comparatively few important changes in our procedural law since the adoption of the original codes, and these were more in the nature of patchwork than any attempt at a general re-examination and revision of the existing systems.

In 1933 our legislature passed an act incorporating the State Bar, and for the first time we had an official body authorized to speak for the legal profession as a whole. Its board of governors promptly chose a committee to suggest what procedural reform was considered advisable. Early in 1934 this committee suggested some seventeen specific changes in civil and criminal procedural law which should be submitted to the Bar, and, unless disapproved by it, recommended to the legislature for enactment. No suggestion was then made for a general revision of the codes of procedure, nor that the authority to make such revision should be transferred from the legislature to the courts.

State Judicial Council Asks Rule-Making Power for Courts

Shortly thereafter the writer of this article, who was chairman of the committee, visited the members of the supreme court of New Mexico, and his attention was called to an act recently passed by the legislature of that state, which, in substance, is the one later enacted by Arizona. The importance of the New Mexico act was immediately obvious, for at the session of our legislature in 1935 none of the specific recommendations made by the committee were adopted, not so much because of any active opposition thereto, as through general apathy and a failure on the part of our legislators, composed chiefly of laymen, to realize the effect and importance of the suggested changes. The State Bar, at its meeting in 1936, adopted a resolution creating the Arizona Judicial Council, which promptly recommended, among other things, the passage of a law similar to the New Mexico act, to which we have referred. Its vital part was the following:

"The Supreme Court shall, by rules promulgated by it from time to time, regulate pleadings, practice and procedure in judicial proceedings in all courts of Arizona, for the purpose of simplifying the same, and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. . .

"All statutes relating to pleading, practice and procedure, now existing, shall, from and after the date upon which this act takes effect, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto."

The recommendation was submitted to the legislature in 1937, but no action was taken by that body. The judicial council in 1938 made the same recommendation, pointing out that the supreme court of the United States had adopted new rules of civil procedure which would govern the federal district courts in the future; that it was of vital importance that procedure should be the same in both state and federal courts, and that our

HON. ALFRED C. LOCKWOOD

LAWYERS INCREASE, LAW-SUITS DIMINISH

(From *Chicago Bar Record*, April, 1940)

THE graph presented on these pages is at first glance disturbing. But a little reflection indicates that its import is not as sinister as it seems. The ratio of litigation to the number of lawyers during the decade of the thirties means nothing without other data. For instance, we ought to know how it compares with the previous decade which certainly did not include anything similar to the peak of litigation reached in 1932 as a result of the depression.

Nor can we accept the number of cases filed per lawyer as a fair index of professional prosperity. Only a few lawyers depend on litigation for the major part of their incomes. The general run of contested lawsuits is not very profitable to most of us, considering the expenditure of time and nervous energy. Litigation pays, as we all know, only when important or valuable rights are involved.

On the other hand we must face the fact that the slump in litigation has been accompanied by a parallel slump in the returns from non-litigious legal business. We emphasize "returns" because some of our friends report an increased demand for their services in small matters. To the question "How's business?" they reply, "Oh, I'm busy enough, but there's no money in it."

The level of fees, especially in these smaller matters, is at the same time being driven downward by competition, unauthorized practice, and the belittling by certain governmental agencies of the need for employing private lawyers. Many lawyers therefore find themselves working full time but netting very little after paying the disproportionately high cost of maintaining an office.

In view of these pressures, which are felt by all but a small proportion of the bar, the current discussion of low cost legal service is extremely irritating to many lawyers. The cost is already as low as it can go, they say. Why not do something to help the lawyers make a living? Our friends who take that view should realize that the proponents of low cost service hope to accomplish that very thing, not by increasing the burden of the public, but by reorganizing certain types of legal service and extending the constructive use of lawyers.

No matter how you may feel about it, the bar is facing a transitional period. The problems raised in current discussions about legal service must be considered, sooner or later, by every lawyer. We therefore recommend the reading of the editorial from the American Bar Association Journal reprinted on the following pages and other articles recently published in the Journal as follows:

Arizona Adopts Federal Rules

(Continued from previous page)

supreme court intended, if the act was passed, to adopt the federal rules so far as they fitted our local situation.

Legislature Takes Action

The proposed act was presented to the legislature in 1939, and was promptly approved by it, unanimously in the senate and with but three dissenting votes in the lower house. The changed result from that in 1937 was undoubtedly due to the educational campaign which had been conducted by the State Bar during the intervening two years, and a realization on the part of the Bar of the importance of coordinating federal and state practice.

The court concluded that it would be well to consider not only the adoption of the federal rules of civil procedure, but also of a new code of criminal procedure, since the American Law Institute had some years before prepared and approved a model one. An advisory committee, chosen by the State Bar, met with the court and went over the two codes, section by section, comparing them with our own existing procedure. We had agreed that since these model codes represented the opinion of the best legal authorities in the United States, based on several years of study, we would assume that their provisions were an improvement on our existing codes, unless it clearly appeared that they were not fitted for our local conditions. Too much cannot be said in praise of the spirit with which the advisory committee approached its task. After several weeks of study and consultation, the opinion of the court and the committee on each section of the two codes as finally adopted was unanimous, except as to one section of the criminal code.

Court Makes Use of Federal Practice Code

When the new codes were distributed to the State Bar, for the first time some substantial opposition to them appeared. While part of it was based upon a genuine doubt as to the advisability of specific changes, it was apparent the majority was due to the very human and natural inertia of all men when a change in existing customs and procedure is suggested. As was said by one of our "elder statesmen," "I have spent forty years in learning our present procedure and now I must start anew with the boys who have just been admitted." This, however, has been the case with all reform movements and was not unexpected, and, like the opposition to other reforms, we feel sure that a better acquaintance with the practical operation of the new codes will remove any honest objections which now exist. In fact, even in the three months in which the civil code has been in operation many of its strongest opponents have abandoned their criticism.

New Criminal Code

The criminal code has just taken effect, and as yet we have had no practical experience with it. The county attorneys of the state, who have given it careful and special study, have generally stated that they believe it will eventually result in the simplification and speeding up of criminal practice and a considerable reduction both in expense and time in the trial of criminal cases.

Arizona a Pioneer

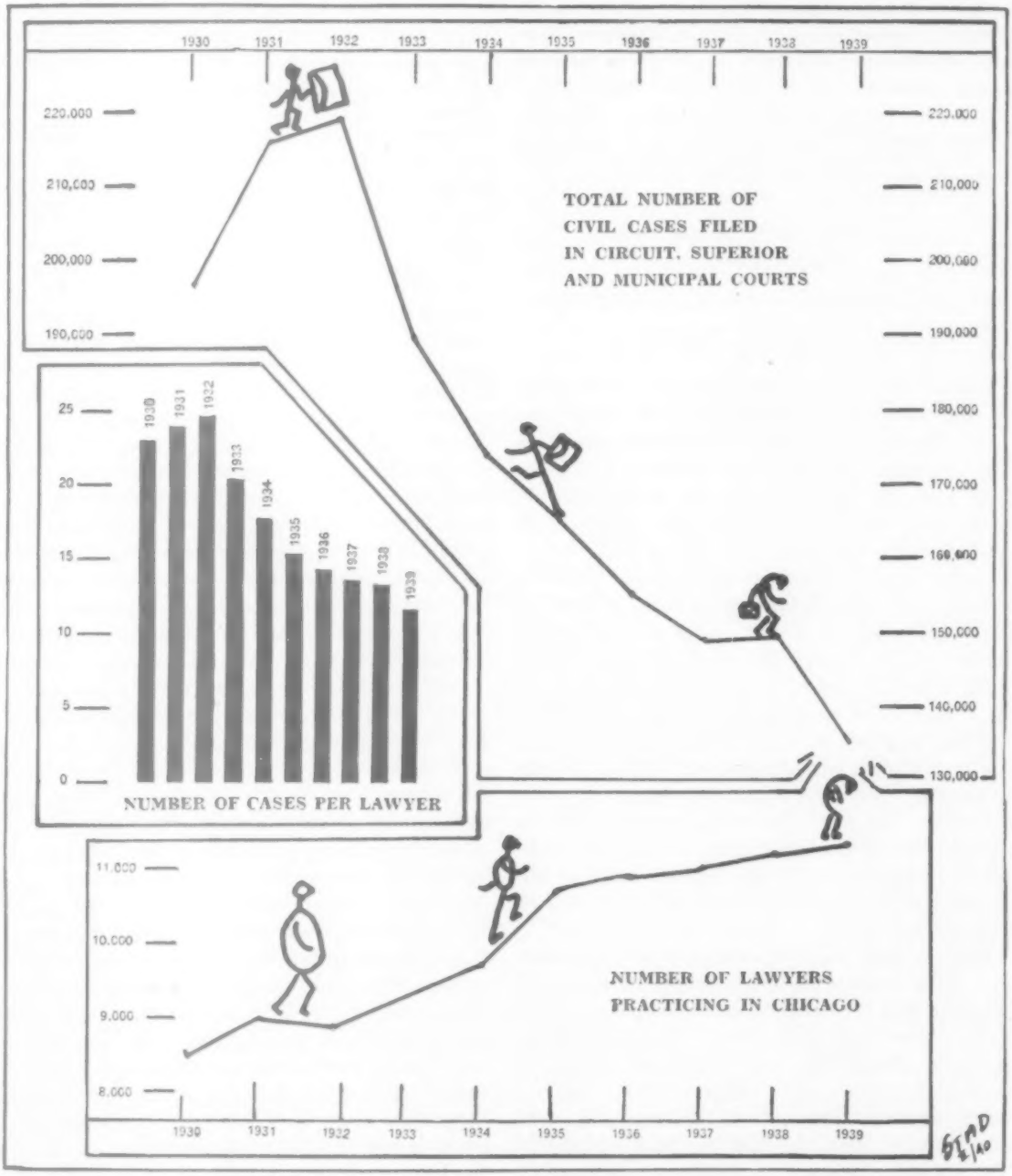
So far as we have been able to ascertain, this is the first time in recent years in which any state has adopted at the same time complete civil and criminal codes based upon models prepared by experts in the work. If the result in Arizona proves as successful as we hope, it may be an example to other states to do likewise.

January, 1940—*The Problem of Undone Legal Service* by Karl N. Llewellyn.

March and April, 1940—*Legal Service for Low Income Groups in Sweden* by Lloyd K. Garrison.

While there is small likelihood that civilized society will ever banish lawyers, as they did in the Utopia conceived by that great lawyer, Sir Thomas More, yet the legal profession as we know it may suffer a drastic and not altogether happy transformation unless it shows the capacity to adapt itself successfully to changing conditions.

LAWYERS AND LAW-SUITS IN CHICAGO



Courtesy of Chicago Daily Law Bulletin

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EVEN-HANDED JUSTICE

Those who at noon on February 26th sat in the quiet courtroom listening to the Supreme Court justices as they announced opinions were unaware that the final chapter had been written in the Manton case. It appeared only on the list "certified by the Chief Justice and handed to the Clerk."

Later, when they had read the afternoon papers, some commented upon the contrast of this scene with that of a few weeks before when tense listeners had heard Mr. Justice Black deliver a strongly worded opinion granting a new trial to friendless negroes because they had been denied their constitutional rights. The contrast was impressive and fitting. In the earlier case grave constitutional questions were involved. The latter had to do merely with the aberrations of an individual. That the individual happened to be the senior judge of the second circuit gave it a news value but had no other significance.

Manton had been represented by able counsel. In a trial presided over by an impartial judge he had been convicted by a jury to which no exception had been taken. That conviction had been affirmed by a circuit court of appeals composed of one circuit judge and two supreme court justices. Its opinion had not only dealt exhaustively with the law but had added that "the evidence of guilt was convincing."

The court of appeals refrained from sermonizing just as the Supreme Court refused to emphasize the case. Such a proper assessment of values was expected of these courts.

Gratifying also has been the attitude of the people. The rarity of such a trial and the certainty with which punishment has followed has renewed their faith in the integrity of the Federal judiciary and confirmed their knowledge that there is one justice for all.

—"Somehow good
Will be the final goal of ill."

WORDS

Speaking of words, as the president of the Association was,—brief reflection on the language of judicial opinions over the past few years reveals what appears to be a tendency to surprise the reader with unusual expressions. We are far from making this a matter of criticism. We, also, like to see occasionally "some ancient, primitive word appear with its face washed and its eyes again shining," or even "some lovely, new-minted term to express a meaning which had not yet found expression" (to borrow from the abounding riches of Mr. Logan Pearsall Smith). This has nothing to do with law? Indeed! Is literature all confined to love and languishment, to dying heroes and beauty in distress? An eminent critic reminds us that the clear and simple statement of a proposition in geometry is literature, quite as much as the Book of Job is literature. There is a glory of the sun, but as well a lesser glory of moon and stars. We shall always need men to tell a plain story plainly, and most of all in judicial opinions, where the everyday affairs of people are put straight.

But there is also a place in every field of literature for the grand style. "The grand style arises," says George Saintsbury, "when a noble nature, poetically gifted, treats with simplicity or severity a serious subject." (For "severity" the dictionary bids us not to think of *harshness*, but rather of *austere purity*.) Here is the judge's cue to enter. Let us suppose a Mansfield and a Sommersett case, or a Taney and a Dred Scott case; have we not here an occasion for the "grand style"?

This is more than a matter of words, yet words are at the bottom of it all. There can be no mechanical rule about it. A word is no more good or bad simply because it is old, than bad or good simply because it is new. Apart from age, a "seventy-five cent word" should

not be tendered in payment in small transactions. We did not like the repeated reference to the defendant, in a recent English case, as the "*peccant* corporation," though of course we all knew what was meant. "Canalize" jarred on us a little, but perhaps this was because of the slight difficulty we felt in deciding whether to assimilate the accent to "canal" or to "channel." A few weeks ago the word "unwitty," in a Supreme Court opinion, excited immediate hostility, at least in law journal offices, where it was realized at once that half of one's readers would infer the negation of something humorous, and the other half would suppose a misprint for "unwitting." The Chief Justice's 'divisive' (in an address) rings true; it is an uncommon word, whose usual habitat, strangely enough, seems to be in books on religious subjects, but it has a sharp, clean-cut quality that commends it to us.

An able and popular writer, now himself on the supreme bench, has said a good word for a Chief Justice of that Court whose reputation has remained somewhat dim: this, we are told, is unjust, but the learned judge had no style, and pedestrian writings, even of jurists, are likely to be neglected. A competent critic finds fault with the prose of modern authors in general: there is the lack of any rhythm in their writing, and (says our admired friend Mr. Smith) "their diction is quite as undistinguished; they all seem to take their vocabulary from a common dust bin." Contrast Francis Thompson, when it was complained against him that he had newly made a verb out of an adjective: "The word lay to my hand and was a right lusty and well-pithed word, close grained and forcible as a cudgel, wherefore I used it; and surely I would have used a dozen such had they served my turn."

We hope that we have not set something in motion. "The worst confusion of speech," wrote one of Dr. Johnson's correspondents, "is caused by a class of writers who affect singularity and invent a Sanscrit of their own to wrap their ideas in a veil of mystery; and yet we often like to hear their oracles and, at last, catch the disease ourselves." The 'fancy word' of the art professed by our learned but very nearly incomprehensible brethren the trademark lawyers "must be obviously meaningless as applied to the article in question." May this hint be taken by the distinguished gentlemen towards whom these observations are cautiously and respectfully directed?

TIME IS OF THE ESSENCE

The Federal Rules of Civil Procedure have entered upon the second half of the second year of their existence. During that time they have been subjected to the ordeal by fire—practical application by the courts. Remarkably few ambiguities or deficiencies have developed.

The rules retain the sanction of the Supreme Court and have by its order been extended to bankruptcy cases and cases arising under the Longshoremen's Act and Copyright Act.

The Advisory Committee was requested by the Court to suggest any amendments it thought advisable. In response it recommended that no substantial changes be made, at least before September, 1941.

In some states members of the bar have been waiting for this testing time to pass before actively considering the revision of their state practice along the lines laid down by the federal rules. They now have the advantage of an actual working model. Not only is such a model furnished by the federal rules themselves, but by the revised procedure of those states which have already altered their practice in substantial conformity with these rules.

The action of the Arizona Supreme Court, more fully described elsewhere in this number of the JOURNAL, has shown the way.

Similar action has been taken in Nebraska and South Dakota. Rules have been tentatively formulated in Indiana and Colorado, but not yet promulgated by the supreme courts of those states. In Maryland, Rhode Island and Texas measurable progress has been made in the same direction.

The Section of Judicial Administration is now engaged in making a factual survey of the procedure in the various states.

The activity in connection with the federal and these state rules has centered the minds of a great number of lawyers upon procedural questions. A vast amount of data has accumulated. The consequence is that the states which are interested in revising their procedure now have a unique opportunity—the opportunity of access to all this material and of consultation with the leaders who have become veterans in procedural reform.

This opportunity will not continue to exist indefinitely. Much of the material is in the form of deciduous leaves and the men who produced it are not immortal. Time is of the essence.

ON READING AND USING THE NEW JURISPRUDENCE*

Jerome Frank Writes "Law and the Modern Mind"—Significance of the Book—Dean Pound's Contributions to the Controversy—His Ideas and Some Caveats Thereon—Guidance to the Judge—The Newer Jurisprudence Looks at the Entire Field, and Attempts a Synthesis

By Karl N. Llewellyn
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LET me now try to sketch briefly one of the major lines of recent writing. To my mind, the central one is the inquiry into "certainty of law"; in any event, it has produced bound books and the merriest bonfires. Ten years ago Jerome Frank, then a practitioner, came out with *Law and the Modern Mind*, and followed the book with a series of articles. The essence of the book was, to take the doctrine that rules of law decide cases in certain and predictable fashion and to demonstrate and document that, taken as description of what happened in court, it wasn't so. What Frank was worried about was why lawyers thought it was so when it wasn't so, and he proceeded to explore at some length a psychoanalytical hypothesis which, from then to now, does not appear to have appealed much to anyone except Frank.

Jerome Frank's Work

In this three things are significant. First, Frank cleared the ground. He cleared the ground because he met the older doctrine, in its less sophisticated form, head on, and in its own terms, and showed it to be unsound description: Do rules do a one hundred percent job of deciding cases with predictable certainty? They do not. Frank advanced the ball on this issue that far, and no further: after his documentation it is no longer possible for an intelligent jurisprude to seriously argue the contrary position; and once the first shock was over, no one has seriously argued the contrary position. But what that does is only to show that one particular half-true formulation never should have had currency as being a whole truth. It does not show "uncertainty" in the law, and in any sense of coin-flipping chanciness. What it shows is lack of 100 percent certainty, and that is all it shows. Whereas 100 percent certainty is not a thing anybody ever had any business to think that we had. What law needs is a manageable degree of certainty and predictability—enough to get on with; more here and maybe less there. Have we that sort of *Certainty-Enough?* Frank gives no answer. He does open the way for posing the problem intelligently, and for doing inquiry where inquiry can count.

Certainty as the End in View

The second significant thing is the way both Frank and his adversaries argued. Having posed the issue: "Is there (100 percent) Certainty?" Frank first cut to results, as being the essence of Law. *for his issue;* for the litigant, certainty is as certainty does. He cut then to the results of litigation, because there unpredictable results were to be found; and he went into the trial court by preference, because he found evidence his way fastest there. Frank's adversaries, on the other hand, talked normative rules as being the essence of Law, because occasional or even frequent improper results do not upset a *rule* (though it is plain enough that they do upset certainty for the interested parties); and then the Anti-Franks talked situations in which counsel had shaped the transaction in advance, and which never came up for litigation; and in regard to litigated cases, they talked appellate courts, where at least the records are settled, and benches sit instead of individuals. Such argumentation leads to no issue; and at the moment of controversy it leads to little light. Each side can celebrate a pseudo-victory; each does; each did. With bonfires. But after the smoke blows off, even such controversy proves to have gotten us a further step along. In this instance, we can now begin to see such things as these: (1) that where counsellors are consulted, there is a body of very solid and predictable law (rules *and* practices) which makes possible the shaping of such transactions as are at all reasonable and decent, with a high degree of certainty—though even these are not utterly proof against skilled perjury; and though when counsellors attempt to accomplish things too outrageous, the courts are likely to break over the seeming rules, and to upset what was really injudicious counselling. (2) whereas there is a great body of less certain law in which rival theories (say, as to just how far a precedent extends) are available, and much will depend on the case which happens to come up, and on the relative skill of the rival advocates, and even on the personnel of the court, as well as on the rules, principles, and classification-concepts of the law. And (3) that the individual litigation, especially where it does not rest on a carefully and skilfully prearranged transaction, offers material elements of uncertainty which no student of our law can afford to hide under any general theory that Law is Certain, but the reduction of which to a greater reckonability is one major task of the profession. This begins to mark out workable subdivisions of "the" problem "of Certainty in Law"—subdivisions whose marking out is a gain for clarity of understanding, a furtherer of intelligent inquiry. To take a single practical application, it is astonishing to discover how clear and sure a rule one can build out of the usury cases when one sets as his inquiry not a question in the second area just described (what is the full distance you can go, and yet avoid the usury prohibition?—a most uncertain matter, as *Corpus Juris* shows), but a

*This is the second and concluding part of Professor Llewellyn's article. The first part was printed in our April number. By mutual agreement, this paper appeared simultaneously in the *Columbia Law Review*.

question in the first area (How far can you go in proper ways and still be almost certain to avoid the usury prohibition?). To answer this second question, one discards the chancy cases, one builds on the clear cases, and works out in consequence a solid investment apparatus instead of a speculation. Such differentiation is old stuff, *to the best lawyers*. It is not old stuff to the run of the profession. The newer Jurisprudence has as one major function to make this kind of working wisdom more explicit, and so more communicable, and so more teachable, and so more common.

The Newer Jurisprudence Is a Putting Together of Things Already Known

Indeed it is a fair generalization that almost nothing the newer Jurisprudence has yet found, and little that it seems likely to find within the next few decades, will prove in any manner *new*, to the *best* lawyers. It will be, as it has been, a putting together of different pieces of what the *best* lawyers know—different pieces which even the best lawyers do not commonly put together and *compare*—so as to make the resulting Whole give other lawyers, and especially new lawyers, a clearer and more usable picture of how the various crafts of the lawyer are best carried on: counselling, advocacy, judging, and administration.

The third significant thing about the work of Frank is, on the one hand, that by dragging into his book a dubious psychoanalytical hypothesis, he opened the solid part of his work to the dialectic reproach that it rested on Freudian psychology. Which it did not. The solid part rested on sound observation, tested and recorded. The Freudian part of the work, on the other hand, is Frank's individual excursion; it is useful to have had somebody do it so that others may see how far he did not get. On the other hand, the Anti-Franks not only have sought to make hay out of his Freudian sowing, but with equal dialectical acumen have read into his work a desire which is there neither in letter nor in thought—a desire to exalt brute power and official arbitrariness at the expense of the right, the orderly, the lawful, and the just. This is a typical example of the cross-purposing of words in the Non-Joinder of Issues in Jurisprudence. As we have seen, Frank's concern is with certainty, for lawyers, in lawyers' daily work. Certainty finds its essence for lawyers and their clients in certainty of outcome, and the tribunal determines the outcome. Hence what the official does is the particular kind of "law", the "certainty" of which Frank is testing. But the Anti-Frank is seeing as "Law" *only* a right and approved rule or norm *for* action by judges or officials. When he sees anything given the name of "Law"—for *any* purpose at all—that means to him that the thing so named is being called "right", and is being approved as a guide "for" action by officials. When read in this perhaps understandable but sadly twisted way, Frank's words can be made to take on shocking character. And the misreading is doubly easy if the misreader himself, sure that we need to keep judges and officials from acting according to their "arbitrary" will and desire, happens also to believe that the sole way to serve that need is by maintaining the beloved doctrine and rationale "Laws and not Men" or "It is the rules which (alone) decide the cases." For those are formulations of doctrine which Frank does certainly attack: first, as being untrue descriptions; second, as being inadequate doctrine. Rules and principles are part of what produces decision, says Frank. There is more, much more. What more? How much more? How can we bring the "more" under more rational control? Frank did not know, for sure. Neither do you. But we need to know. And as for further study of the matter, the way to resume is to resume.

Pound's Four Contributions to the Discussion

Into this certainty controversy Pound, in the post-Frank whirl, injected at least four ideas which have real fertility, and whose implications need following up as much as does that subdivision of the field of study which is the first conclusion to be derived from Frank's work. The Pound ideas with their appropriate caveats

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Some references are in order to the Writers Mentioned in the prior installment. The more prolific of them, such as Radin, Hamilton, and Pound, are extremely uneven. Each, at his best, is very fine. In addition to material cited elsewhere herein, the following are characteristic, and illuminating:

Radin: The Permanent Problems of the Law (1929) 15 Corn. L. Q. 1; *The Chancellor's Foot* (1935) 49 Harv. L. Rev. 44; *Solving Problems by Statute* (1934) 14 Ore. L. Rev. 90; and the forthcoming Storrs lectures at Yale: The Law as Logic and as Experience.

Hamilton: *Institution*, in 8 Encyc. Soc. Sciences 84 (1932); *The Jurist's Art* (1931) 31 Columbia L. Rev. 1073 (on Brandeis); *Cardozo The Craftsman* (1938) 6 U. of Chi. L. Rev. 1; *Preview of a Justice* (1939) 48 Yale L. J. 819 (on Frankfurter); (1939) 39 Columbia Law Rev. 724 (on Blackstone); (with Adair) The Power to Govern (1937); Price and Price Policies (Hamilton ed: 1938).

Fuller: *American Legal Realism* (1934) 82 U. of Pa. L. Rev. 429; *on Williston's Contracts* (1939) 18 N. C. L. Rev. 1. The forthcoming lectures at Northwestern on The Law in Quest of Itself should be of equal value.

M. Cohen: *Law and the Social Order* (1933).

Carter: *Law, Its Origin, Growth, and Function* (1907) is the best known work; much more satisfactory is the little-known pamphlet, The Ideal and the Actual in Law (1890). Gray's Nature and Sources of the Law (1909, 2d ed. 1921) is a more rounded, and wiser, book.

Pound: *The Scope and Purpose of Sociological Jurisprudence* (1911-12) 24 Harv. L. Rev. 591, 25 *id.* at 140; *Interpretations of Legal History* (1930). In general, and with exceptions, the articles published before 1911 assay high, and those after 1930 lower, *e.g.*, that cited in note 13 *infra*, which re-slaughters a dead horse. In the particular field of Torts, under discussion in that paper, one cannot, for instance, dispose of the good modern work as one does and should of Brooks Adams' naivetés. Compare Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 Yale L. J. 584, 720; Steffen, *Independent Contractor and The Good Life* (1935) 2 U. of Chi. L. Rev. 501; Hamilton, *The Living Law* (1937) 26 Survey Graphic 632.

Indeed, and in general, modern use of economic factors for study of the drives influencing law brings out results rather comparable to Pound's own results with "security of transactions" and "security of acquisitions," but more tentative than these latter, because more detailed. Compare Steffen and Danziger, *The Rebirth of the Commercial Factor* (1936) 36 Columbia L. Rev. 745; Lerner, *John Marshall and The Campaign of History* (1939) 39 Columbia L. Rev. 396; Llewellyn, *On Warranty of Quality* (1936-37) 36 Columbia L. Rev. 699; 37 *id.* at 341; *Horse-Trade and Merchants Market in Sales* (1939) 52 Harv. L. Rev. 725, 873. For admirable very recent work by Pound see *A Hundred Years of American Law*, 1 Law—A Century of Progress 8 (N. Y. U. 1937); *What Is the Common Law?* cited *supra* note 10. Pound's strength lies in tremendous reading coupled with a peculiar flair for flashing suggestion that lights up significant currents. His weakness lies in impatience about fitting his multitude of good ideas together, where they overlap or conflict; with a consequent tendency to use any one of his own suggestions at any given time as a solid, safe major premise, out beyond where, unqualified, it is either safe or solid. His keen juristic instinct then signals trouble. At this point he either goes into new and closer examination of the data, and works out an enlightening relation between the overlapping ideas; or else he allows the rhetorician in him to curtain the felt uncertainty with waving words.

Hutcheson: *Judgment Intuitive* (1938), especially the title essay; *The Glorious Uncertainty of Our Lady of the Law* (1939) 23 J. Am. Jud. Soc. 73; and the forthcoming addresses at Cincinnati last February. *Law as Liberator* (1937) came too early to reflect Hutcheson's recent advance in analysis.

Harris & Ewing

JEROME N. FRANK

are these: first, no study of law which is to cover the whole of the ground can take its eye off the ideal elements which the facts only partially reflect. This holds even for purely descriptive study; ideals—notably those two ideals, so often inconsistent in their seeming bearings on a particular matter, the ideal of certainty and the ideal of justice—ideals do show observable effects on the behavior of judges, and of other people. The caveat is that the effects they show which we thus far know about are mass effects, and that lawyers, and judges, need a Jurisprudence which can get closer to guidance as to tomorrow's individual cases. Pound's second useful idea was to challenge any assumption that because such a doctrine as "rules of law decide cases" is inadequate as a full description of what happens, it is therefore inadequate as doctrine. Bad description may, as he points out, be admirable doctrine; for one function of doctrine is to get facts and results shaped out of what they are into what they ought to be. The caveat is that this *particular* piece of doctrine needs supplement not because it is bad description, but because it too often fails to give clear guidance in the particular case; if left unsupplemented, it leaves to the hunching process the determination of such matters as when a precedent will be distinguished, when on the other hand it will be followed flat, or even have its "principle" extended. Pound's third contribution has been mentioned: the re-emphasis on the "concepts" of our law, our "relational thinking," our "legal techniques," as being clusters of elements in our law which, over and above the rules and principles of law, help guide decision and control it; and his introduction of the formula "taught tradition" into the picture, as a further cluster of guidance. The caveat is that all of these are ambiguous both in the large and in the particular; again the lawyer's vital question goes unanswered—to wit, which technique is the correct techniques," as being clusters of elements in our law which, But the ideas mentioned remain magnificent focussing glasses for further detailed study. And Morris Cohen, for example, in his insistence on a phenomenon in law akin to "fields" of force and strain-in-a-given-direction in physics, advanced the ball here; as does Levi with his inquiry into what leads us to find "similarities" for the application or extension of rules. Such work needs to be built together, tested out concretely on series of cases, refined, further developed. A further caveat on this matter of the "taught" tradition runs to the fact that a goodly portion of our effective tradition is not taught at all, but remains hidden in the unspoken; it is only learned, it is absorbed through the pores or through haphazard imitation, or it is reinvented, man by man, in the process of doing the job. This untaught portion of the tradition, especially of the tradition of judging, is acquired unevenly, and we have as yet no convenient or communicable way of checking up on how or how far it has been absorbed, or indeed on what it is. But efforts at reduction of its content and use to more rational description and control are of the essence of increasing certainty and wisdom in judging. Pound rightly warns us in a current essay that we must not expect too much from reason in the law;[13] one can go with the warning, and yet feel it essential to use, in consistent, sustained, self-corrective effort, such reason as we have, in an effort to reduce to somewhat greater manageability those silent aspects of the law which lie in the judges' *ways of work*.

(1) The Goal of Law Is Justice, and (2) Judges Are Not Free to Be Arbitrary

The fourth contribution of Pound to the advancement of the ball is difficult to describe, but was the most serviceable of all. Again and again, in language often difficult to make clear meaning out of, and often enough at intellectual odds with itself inside the same essay, he recurs to one vital point: if these modern jurisprudes are forgetting that the goal of law is justice, and forgetting also that judges and other officials must not be free to be arbitrary, then they need correction at once and, if need be, with a club. For to Pound the heart and core of Jurisprudence is what the heart and core of Jurisprudence ought to be to any scholar: to wit, right guidance to the judge—or to the legislator—or to the administrator. And I for one am ready to do open penance for any part I may have played[14] in giving occasion for the feeling that modern jurisprudes or any of them had ever lost sight of this. I do not think any of them ever has. They seem to me to be singularly affected, one and all, with zeal for justice, and with zeal for improving the *legal* tech-

13. The Economic Interpretation and the Law of Torts, 53 Harv. L. Rev. 365 (1940), 368 f.

14. Especially, so far as I can make out, by one remark on page three of my *Bramble Bush*, although half that book is devoted to rules and their meaning, and my own doubts had been as to whether it did not contain more preaching of ethics than students would stand for. In any event, *Bramble Bush*, page three, is cited almost wherever this matter is under adverse critical discussion, and the rest of *Bramble Bush* is not. So. e. g., by Auburtin, Kantorowicz, Dickinson, Goodhart, Pound, Kocourek. One high authority makes that ill-starred single page lead off a list of citations whose every other member is a book or a full article. I hereby repudiate *Bramble Bush*, page three, save when taken in conjunction with Ch. V of that book; even then, I regard its emphasis as out of balance; let me set with it also 1100 pages of study of the law of Saks, which appeared in the same year.

niques for doing the law's business. But it is certainly in large part the result of Pound's indefatigable reaffirmance of the basic truth about the heart of Jurisprudence that the other moderns are taking pains these days to make sure that they get and keep these interests of theirs from being overlooked or misconceived.

This problem of finding guidance for the judge is the core of Cardozo's jurisprudential thinking; upon it all his descriptive study centers. It is the core of Hutcheson's writing, as well. Neither doubts the presence and importance of precedent and rule of law, of principle and concept; nor does either show impatience with these things. But each, facing at once the rules of law and the judicial task, found that the rules provide not *the* answer, but only part of the answer, for the task. Each, therefore, set about to see what could be said about what *also* there was to the task, and what *other* guidance there might be available for the doing of it. Each, thoughtfully but gropingly, in careful searching of his experience and his conscience, came out with some light, which is not as yet enough light. Hutcheson's contributions must be considered as hardly more than begun. The "judicial hunch" and the "little, small dice" expressed deep conviction on three points; first, that there was more to it than the rules of law, and that the "more" was frequently the most vital part. Second, that it thus became a question of individual judicial responsibility. Third, that the judge himself was often puzzled as to how he got the answer, even when he had become certain that he had it. But first in the address on "glorious uncertainty," and then and more clearly at Cincinnati last February, Hutcheson moved a definite step forward; he marked out what the field of the judge's *limitation* was; he marked out where the judge was cleanly *controlled* by precedent. To get that down and get it clear is to subdivide the original problem for study; with *control* largely clarified, the search for articulating the lines of *guidance* in the area left open becomes much more sure. Hutcheson's next writings will prove exciting.

Indeed when one takes as the central theme this problem of guidance to the judge—or to the legislator—or to the administrator—one finds every line of work in modern Jurisprudence falling into an organization as clear as that of spokes around a common hub, building themselves together into a common wheel. Any one of these lines may be pursued in a single paper or by a single writer, in utter independence of the others, in complete "narrow" specialization of effort, in seeming variety of direction among the different jobs; yet each in its own way works to and from the common center, each contributes toward the total central task which calls for use of all of them together. Let me illustrate by a number of lines of modern work which would seem to be at war, if any of them should be misestimated as being what it is not, namely as being an effort to stake out an exclusively valid approach to the *whole* field of Jurisprudence. None of these lines is to be soundly conceived as denying the worthwhileness, utility, necessity, of other complementary lines of work. What each does is to insist that its own line has sufficient value, actual or potential, to warrant careful and sustained labor on its exploration. The older writers—such men as Bentham, Savigny, Ihering—seem sometimes to have written as if work in Jurisprudence had no point unless it could at the moment of its doing be brought into its right relation with a whole and rounded view of all of law and all law's work. The current writers, even along with the impatience they sometimes display with one another or with a tough-minded and sometimes tough-hided profession, do show a gratifying intellectual patience in this: that they are willing to work hard over one small piece of the picture, just as being one needed piece, in an effort to get *that piece* into better shape for synthesis tomorrow, and perhaps by someone else who may happen to take synthesis as his line of labor.[15]

Logical Analysis of Problem and Law of Proof

There is for instance the logical work of Michael and Adler on the problem and law of proof.[16] They work out a formal logical analysis in much greater detail and with much greater rigor than is the practice of our law. Accepting thus what is already one of the recognized working tools of the law, logic, they explore the light and guidance to be had from using that tool with a precision and incisive impact which practice has edged away from, because the practice of our law has been to treat *sustained* and accurate formal logic as impractical. Yet the results of the Michael-Adler effort are extremely illuminating, and a similar effort would, to my mind, illuminate any field of law in which some single fairly well accepted postulate is alleged to control. To put an instance, the conception that contracts are made by the parties as they will to make them, could no longer maintain itself if its consequences were once worked out cleanly and fearlessly, and put down to be looked at in their utter inconsistency with that half or more of contract law which real acceptance of that postulate would require our courts to junk: constructive conditions, for one typical example, or the law of penalties, or the infant's privilege, or the requirements of consideration and of the statute of frauds.[17]

Law, and Law's Work, and Law's Personnel

Such work in formal logical analysis, while it is going on, requires temporary utter contentment with the premises on which it rests; else the logical development will not be clean. It requires temporary utter indifference to the consequences derived from the premises, else the unpleasant or distasteful consequences contained in the premises will not be deduced and expressed; the logical operation will instead be fudged. But this does not mean that the men of formal logic are

15. Much of the controversy turns on cross-purposing of this sort: X alleges that the psychology of judges needs study, and tries some study along behavioristic lines. Y reads that X is trying to *substitute* behavioristic psychology for rules and principles, to deny freewill to judges, and to urge as right law whatever judges take it into their heads to do. I. e., much cross-purposing turns on reading an X's insistence that something or other goes into or is part of Jurisprudence—is a spoke—as being an allegation that the something is the exclusive *all* of Jurisprudence: wheel and hub. This is an inevitable accompaniment of exploratory writing. The explorer commonly over-stresses, in language and in flavor, the value or significance of the particular thing he is after. Even if he does not, it is the novel which stands out to the reader, and by filling his *attention* and being the Whole for the moment, to him, it almost by necessity appears to reek with implicit denial of everything else.

16. *The Nature of Judicial Proof* (1931); The Trial of an Issue of Fact, 34 Col. L. Rev. 1224, 1462 (1934).

17. A first indication of the degree to which the postulate does not hold up, in either established law or accepted doctrine, is found in Cook, Review of Williston on Contracts, 33 Ill. L. Rev. 497 (1939). And see the lovely illumination of the criminal law in Michael and Wechsler's forthcoming book, by following the particular variant premises of our own criminal law through rigorously, and displaying the bearings of the various conclusions on one another. Compare their Rationale of the Law of Homicide, 37 Columbia L. Rev. 701, 1326 (1937).

Underwood & Underwood

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at odds with such other men as Felix Cohen when these latter are insisting on the utter need for digging out the ethical premises underlying rules of statute or decision, for making those premises explicit, and for testing out whether they are good premises.[18] There is another line of work which fits into the picture. One finds much written by the newer jurisprudes about the importance of the effects of law, the importance of seeing what actually happens in or out of court, the importance of the actual behavior of judges or other officials, the importance of what the laymen concerned are actually doing, doing under the law, or with it, or in spite of it. What this means, in the perspective, is that the total picture of law and law's work extends beyond either the rules alone or the ideals alone, and indeed beyond the immediate legal institutions such as courts; and that it pays, on any given matter, to go exploring. To a lawyer actively engaged on a case this seems somewhat obvious, as to that case. It has sounded a little strange when the context has been that of Jurisprudence, because Jurisprudence has been conceived as a Philosophy of *Law*, and Law has commonly been distinguished from Fact. But Jurisprudence as a Philosophy of Law is too narrowly conceived to reach its full development; the modern writers are conceiving it as a philosophy *not only* of Law, *but also* of Law's Function, *and* of Law's Operation, *and* of Legal Institutions: i.e., of Law *and* Law's Work,[19] *and* Law's Personnel.[20] Such widening of scope involves not elimination, but illumination, of rules and principles of Law. In much the same fashion the emphasis placed on descriptive study is to be understood. To deal with conditions, you have to know what they are. To see what they are, you have to do your best, while you are trying to observe and record, to keep your vision from being tinted with what you either desire or abhor; neither viewing with alarm nor pointing with pride is a good road into balanced observation. If descriptive studies, or would-be descriptive studies, are viewed as spokes of the great wheel, they fit, and they help. If they are misviewed, as being efforts to cover the whole ground of Jurisprudence with reference to their subject-matter, they shock, because they are then given the sad semblance of attempting to eliminate the proper function of Law, which is to control and direct; or what is almost worse, such misviewing gives them the semblance of attempting to make Law merely follow and conform to what may be evil practices found to exist among laymen or officials.

Merit of the Newer Jurisprudence

The newer Jurisprudence has in all of this shown one rather gratifying quality. It is plain enough from what has been said that different men have been working in different areas, along different lines, and that any of the lines, if mistaken to be an effort at staking out of The Whole of Jurisprudence, can be made to look pretty

18. Felix Cohen, *Ethical Systems and Legal Ideals* (1933).

19. The evidence of this pervades the law reviews. The last five to ten volumes of Chicago, Columbia, Harvard, Yale, Law and Contemporary Problems, can be cited almost in bloc, with special emphasis on the student notes. Neither is the discussion and investigation of fact-situation and of law's effects limited to the more important and even theatrical issues in the forefront of public attention, ranging from, say, labor and corporate finance (with 77B) on into the alphabetical administrators and the problems of taxation—the bulk of which material in the reviews mentioned alone is to cause wonder at Nussbaum's judgment that "the amount of fact research is slight." 40 Columbia L. Rev. 189, 200 (1940). Of course, all perspective is distorted if reading concentrates upon the polemical or programmatic writings, as most critics have, or even upon the signed writings. The test of vitality in the movement lies in the bulking student work, in the spread of research beneath the doctrinal surface into the odd corners where public interest is *not* focussed, and in the cumulation of such work. Some scattered sampling is cited from the earlier work in my Some Realism About Realism, 44 Harv. L. Rev. 1222 (1931), in the footnotes and the appendix. The type of thing I mean is the symposium on small debtors, 42 Yale L. J. 473-642 (1933), followed up by such papers as Elson, Collection of Unpaid Wages and Financial Responsibility of Employers, 5 U. Chi. L. Rev. 609 (1938); Garrison, Wisconsin's New Personal Receivership Law, 1938. Wis. L. Rev. 201; Stone and Thomas, California's Legislature Faces the Small Loan Problem, 27 Calif. L. Rev. 286 (1939). Or the delvings into odd corners of contract law cited in note 24. Or Britt, Blood Grouping Tests and the Law, 21 Minn. L. Rev. 671 (1937); Galton, Blood-Grouping Tests and Their Relationship to the Law, 17 Ore. L. Rev. 177 (1938). Or Goble, The Moral Hazard Clauses of the Standard Fire Insurance Policy, 37 Columbia L. Rev. 410 (1937). Or the extraordinary mass of material which has accumulated, some of it informative and penetrating, on the subject of the consumer's action for defects causing serious damage. Or the material sampled in French, The Automobile Compensation Plan (1933); Symposium, Financial Protection for the Motor Accident Victim, 3 Law and Contemporary Problems, 465 ff. (1936).

Such case-books as Durfee and Dawson's on Remedies, Steffen's on Agency and on Commercial Paper, Powell's on Trusts and Estates, Michael and Wechsler's on Criminal Law, my own on Sales, and, despite the practical absence of notes, Thayer's on the Law Merchant, are effective studies on how the law works and what lines of law work best, and why, and on how to use the law, as well as teaching tools for instruction in the law.

20. Symposium, *The "Unauthorized Practice of Law" Controversy*, 5 Law and Contemporary Problems, 1-174 (1938); The Economics of the Legal Profession, Am. Bar Assn. Comm. on Prof. Economics (1938); Stone, Certain European Legal Aid Offices, 25 Calif. L. Rev. 52 (1936); Garrison, Low Cost Legal Service in Sweden, 26 A. B. A. J. 215, 293 (1940).

awful. In addition, the temptation to lump all the newer writing into one "School" lies very close; for all of it contains at least the common element of a strong feeling that the older Jurisprudence is not alone sufficient unto our needs. But a "School" whose characterizing attributes are found at the extremes of the several spokes is bound to be a terrifying thing for a man to be accused of belonging to; and it gratifies, that most of the newer writers have gone their ways attending as best they could to the jobs that they were on, and trying to learn, without too much regard for the labels which were pasted on them.

Let us go on to observe another spoke or two of the wheel. Here are men like Brendan Brown, trying to work out in clear detail the implications for our common case-law and our detailed legislation of the Natural Law as developed, say, by Aquinas.[21] They are going to be using, in making their determinations of what health of our society calls for under Natural Law premises, the fact-grubbing of realistic writers who are at the moment of grubbing no closer to philosophy than the study of such things as what language the certification-stamps of Chicago, St. Louis, and Pittsburgh banks contain.[22] Or, here is a "behaviorist" at work on trying to add to the techniques for guiding judicial decision.[23] For the moment he is disregarding judicial language, and may seem to superficial observation to be "warring on rule and principle." He may gather twenty or two hundred cases on some situation, and try to play facts and issue straight against result. But if he succeeds, what he will bring out will be a *new and better rule or principle of case-law:* "The factor which the judges have been feeling for, and responding to, in this situation, has not yet been clearly articulated in the rules in vogue. Here it is. It focusses the real issue; it lines up the cases; stating it this way helps you predict more accurately what will happen; it helps a judge see more clearly what to do, and why. It is 'the true rule' of the situation."[24]

Run through the branches—or the budding twigs—of the newer Jurisprudence, then, and you will see each one growing and hardening to become a good spoke of the wheel: the branch of logical analysis, that of philosophical postulates, that of ethical values, that of the psychology and experimental logic of judicial decision, that of recanvass of the concepts and principles of any field of case-law, that of inquiry into the facts about the life under law and of law's effects on that life, that of the nature and work of legal institutions, that of the working principles of each one of the legal crafts, that of the general philosophy of law, that of battle upon extravagant dictum—each seeks to supplement the

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others in dealing with law's jobs of here and now. And no particular writing comes into perspective until one notes which, and how many, of such spokes it is addressed to. Compatible with all such lines of work is the type of detailed and vigorous critique to which Kennedy has been exposing some of the results.[25] The fresh look at what actually goes on, the sustained insistence that all that is observed must be accounted for—exploration, testing, correction: this is the line of advance. And obviously compatible is such work as has been going on in the companion statutory field (e.g. Radin, Landis).

Thurman Arnold Comes Into the Field

The next writer who needs discussion as we recur to the particular problem of certainty, hit into the puzzle from a novel angle. Moore and Oliphant, in an effort to get a more reliable basis for work than the accepted rules, had made two divergent efforts. Moore had attempted study of the background of people's practices as a guide to decision of cases; the essential result on our question of certainty is that the technique attempted proves unworkable for the run of cases. Oliphant had attempted to correlate facts, issue and results of cases, independently of the reasoning of the opinions; the essential result from his work is that—as case-law history shows—this is frequently, but not always, an excellent road out of confusion, but that its effect is to give us new and clearer doctrine, to be dealt

21. Natural Law and the Law-Making Function in American Jurisprudence, 15 Notre Dame L. J. 9 (1939).

22. Cf. Steffen and Starr, A Blue Print for the Certified Check, 13 N. C. L. Rev. 450 (1935); Bogert and Fink, Business Practice Regarding Warranties in the Sale of Goods, 25 Ill. L. Rev. 400 (1930).

23. E. g., Oliphant, A Return to Stare Decisis, 14 A. B. A. J. 71, 107, 159 (1928); 6 Am. L. S. Rev. 215 (1928). For a court at work along similar lines, see Cochran, J., in Cincinnati Traction Co. v. Cole (1919) 258 Fed. 169. It is *one* of the standard case-law traditions.

24. Compare for efforts along such lines: Havighurst, Services in the Home—A study of contract concepts in Domestic Relations, 41 Yale L. J. 386 (1932); Shattuck, Gratuitous Promises; a new Writ, 35 Mich. L. Rev. 908 (1937); Eno, Price Movements, etc., 44 Yale L. J. 782 (1935); Campbell, The Protection of Laborers and Materialmen under Construction Bonds, 3 U. Chi. L. Rev. 1, 201 (1936-7); and compare the notes and papers cited in my paper in 37 Columbia L. Rev. 341, from 374 on.

25. E. g. especially on Felix Cohen: Functional Nonsense and the Transcendental Approach, 5 Fordham L. Rev. 272; Cohan's letter, id. at 548; More Functional Nonsense, 6 Fordham L. J. 75 (1937); on Arnold, Realism, What Next, 7 Fordham L. J. 203 (1938); on Eno, 8 Ibid. 45 (1939); also Kennedy's forthcoming paper, Psychologism in the Law.

with still along the familiar case-law lines. And that, on the grand scale of statistics, the method is impracticable.

But Arnold, instead of reaching for ways of decreasing the uncertainty of law, conceived of examining uncertainty for the utility which it might have; which was akin to adding Carlyle's *Sartor Resartus* to the work of Bentham. Where rules speak with a forked tongue, said he, the way is open for judges to do justice in the case in hand: the rules leave them free to deal with their main job. And especially as to the criminal trial, he put his finger on a matter too often overlooked: an impressive ceremonial has a value in making people *feel* that something is being done; this holds, whether the result is right or wrong; and there is some value in an institution which makes men content with fate, whatever that fate may be. The Certainty Boys, argued Arnold, are impossible idealists; they want what no living system of law can give them, so they fool themselves into thinking they have it. The Uncertainty Boys, he argued further, are just as bad; they really want the same thing, which is why they are making a terrible noise over discovering that there is no Santa Klaus. But the wisdom of that great institution, our Law, lies in providing everybody with a satisfying ceremonial, and in providing the judges—or other officials—with a wherewithal to do their best from case to case.

Core of Truth in Arnold's Work

This much of Arnold's work is an exceedingly useful contribution, and, though over-stated, contains a huge core of truth. But it is not on our major issue, which is: How, by taking thought and giving study, can we achieve more of manageable certainty than life has been willing to just drop into our laps? And how can we keep the freedom of judges—and other officials—to do their best, and be just, from being freedom to do their worst, and be arbitrary? So that Arnold's books,[26] though illuminating and stimulating, do more to clear ground than to advance this particular ball. He makes one suggestion which is the procedure of our case-law put into generalized advice: work it out case by case, and recanvass your generalizations, case by case. But that, being what our judges have been doing for some centuries, is only reaffirmance of tradition.

There is another suggestion which results from Arnold's work. If he is right, then men of the law who venerate even those parts of legal ceremonial which can be shown to give no guidance or actually to further confusion in decision—such men are yet on the trail of a real value which it is also the office of the law to serve. If Arnold is right, any reframing of particular legal doctrines, any addition to or clarification of the techniques of decision, must not only better serve control of arbitrariness and guidance to justice, but must also satisfy men's craving for reasonable certainty of *form* as well as substance, and for dignity of process as well as dignity of result. This is a necessary conclusion from Arnold's work, if he is right on the point; and I think he is. One must not "unsettle doctrine," even to get better results, or lawyers will refuse to come along, and so will judges. This has interesting implications. It means that new and better doctrine must be produced along old and familiar lines of doctrine-production, in order that it may be a "discovery," and not an "unsettling." And that is a very neat addition to the objectives and methods of a newer Jurisprudence which had tended to think too exclusively in terms merely of increased certainty and increased justice and wisdom of results.

Arnold and Frank in Theory and Practice

Why, then, does Arnold's discussion set off so much commotion—in terms, e.g. of its supposedly vicious "tendencies"? I should like to try to answer that with two figures. The first is from football, in the days when play could pile at the side-lines. Arnold attempts an end-run. It gains quite a few yards, on our certainty problem, but its major service is to get the ball into the middle of the field. Is such an end-play to be judged for its seeming "tendency" into the far grandstand? It seems to me wholly characteristic of the essential nature of the *game* (as distinguished from the particular play of the moment), as the game was seen in essence by both Arnold and Frank when they wrote, that Frank, the "uncertainty" man, the alleged atomizer of all rules and their denier, was at the time engaged in writing successful briefs, giving effective counsel, with rules of law and from them; and that he is now making and applying effective regulations of legal character; and that Arnold, the alleged describer of unprincipled guidelessness, the alleged mocker of law as empty ceremonial, is working out the most consistent, reckonable, guidesome and wholesome administration of anti-trust laws which we have seen since we have had such laws.

The second figure has to do with the irreverence of Arnold, along with other modern jurisprudes. For their manner of writing has involved its portion of verbal thumbing of the nose. The figure is that of a roof, a shingle roof. The modern jurisprudes have, so far as I can make out, an appreciation of the roof our legal system puts over us all which is a deal more live than that of most. They think it serves a noble function, as well as a useful one—so much so that they get impatient of any leaks at all. But they view that roof as made of many little pieces put down by many different hands at different times, some of which pieces are wearing out, or threatening to, or have worn out already. Any particular piece they happen to be looking at is suspect. *It* is entitled to no reverence, while the looking goes on. It is to be tested as if *it* might be the leaky one. As a piece under examination, not one tiny presumption holds in its favor. To indulge presumptions when inspecting, is to endanger the roof. And if the shingle is found faulty, it must be replaced, and at once, and with a solid shingle. Such is the line of work which catches and cures leaks before they happen, and keeps a whole roof whole and worthy of devotion. Even if, when a gob of dirty drip hits such a shingle-worker in the eye, he utters colorful remarks about "that . . . roof," the part of wisdom—as well as mercy—in reading his Jurisprudence is to assume that such remarks are obiter.

Reader's Guide to Modern Jurisprudence

Indeed, one can lay down by this time a principle for reading modern Jurisprudence. If the writing is colorful rather than merely graceful, then the chances are strong that it has not been thought through, and is to be read for its suggestion rather than for its conclusion. There is indeed a little graceful jurisprudence abroad in print which is shoddy, or is shallow; but there is no heated jurisprudence abroad which has worked out into wholeness. One can even proceed to lay down two

26. *Folklore of Capitalism* (1937) had the greater circulation; but the ore of *Symbols of Government* (1935) is richer.

further principles for reading this modern Jurisprudence: if readability, absence of heat, and some grace of expression are one first indication of probable ripeness of the product, the two others are, first, that one should have to stop at least once on a page, to call up, in his mind, out of his own experience, illustrations or further illustrations of the point which the author is making; and, second, that if appropriate illustrations do not come, either the page is unripe or the reader is unripe for it. If they do come, the page is already paying for the time its reading has consumed.

Before leaving the point of form, and so, this time, the subject, let me call attention to one fascinating facet of modern Jurisprudence: the reintroduction into that field of satirical and ironical writing. I refer not merely to the sprightly style and pungent exaggerations of, say, Frank and especially Arnold, matched, from a more conventional jurisprudential approach, by Kennedy, Jacobs, and Leach. I refer to whole straight pieces cast in a tone reminiscent of the ironists. T. R. Powell's *An Imaginary Judicial Opinion*[27] is the first that comes to my mind. Rodell in his *Farewell to Law Reviews*[28] presents a beautiful example. The art lay there in such delicate, cumulative, dispassionate scarifying of undeniable weaknesses as to present a seeming case not for reform but for Abolition outright. Teufelsdröckh's *Jurisprudence, The Crown of Civilization*,[29] though heavier and not so neatly architectured, attempted the Swift tradition of solemnly glorifying all that was worst in the trade practice of the jurisprudes. Jervey's *Foam* (or, *The Jurisprudence of Ice-Cubes*)[30] moved from pseudo-jurisprudential principles gathered from a galaxy of parodied theories into triumphant demonstration of absurdity, flinging garlands on the way. The point for the present purpose is that this type of fun-making is a symptom not only of exuberance, but of strength; not only of irreverence but of self-critique. And that it may presage for modern Jurisprudence some reintegration of the fine arts into the study and critique of law along lines familiar enough two centuries ago, or even one, lines healthy for law and lawyers. It must be confessed, though, that Rodell's last venture along this line is less successful. *Woe Unto You, Lawyers* follows the basic pattern of *Farewell to Law Reviews;* i.e., it sets up weakness after weakness calling for reform, and builds them into a seeming case for Outright Abolition—this time, Abolition of The Technical Law as lawyers perpetrate and mangle it, Abolition of The Technical Courts, Abolition of The Lawyers themselves.

What Rodell's Book Means

This is a lovely project. It is big at once with belly-laughs and with reform. And Rodell's chapter on *Senior* v. *Braden* is, for example, superb. The difficulty is that such a project calls for an almost superhuman craftsmanship, on the extended scale of an integrated volume. A. P. Herbert's *Uncommon Law* carries only because it is broken into pieces. Even Swift, after his sustained satirization of humanity in Lilliput, broke down as to the giants of Brobdingnag, because he could not simultaneously put over greatness of soul and grossness of body. Rodell's *Woe* book attempts a similarly incompatible combination. His satire rests at once on uncertainty and chicanery. Now one can make a biting burlesque along either line; but to develop "chicanery" with artistic clarity requires that the rules with which the chicanery is practiced be shown not as themselves uncertain, but as *clear,* in both purpose and phrase. And that cannot help but undermine all "showing up" of "inherent uncertainty." In result the book leaves the reader emotionally and esthetically confused; and the Great Proposals at the end, instead of being at once funny and stimulating, become merely silly and boresome. Good satire, moreover, cannot afford to call the name; the line of the burlesqued nose and squinting eye must show the rascal. Rodell's purpose was thus defeated when he first introduced the word "racket" into a satire, whether of Law and Lawyers, or of any other thing. Get out your Gulliver, and contrast Swift's clean-lined job when Gulliver is describing to the Houynhnms the work of our tribe in Merry England. It is a pity, too, because Rodell has the rhetorical advantage none of the rest of us can claim, of being able to open a Hogarthian sketch with the grave announcement that *he,* at least, is no member of the bar.

Once More—Freedom to Be Just Vs. Freedom to Be Arbitrary

In sum, not all of the newer Jurisprudence, viewed as square-feet of print, has wholly paid its way. But a series of important areas, of import both theoretical and immediately practical, it has opened. The central problem is the working out of rational techniques for marking off the area where freedom to be just is necessary, from that in which freedom to be arbitrary is to be excluded; and for working out more rational techniques for guidance of judges and other officials, within the former area. Call it sustained and realistic examination of the best practice and art of the best judges in their judging. Call it the effort to develop out of that best practice, and into communicable, serviceable form, rules and principles for the right and rational and more unambiguous use and development in day to day detailed work, of the rules and principles and concepts of our law. In addition, a goodly number of other problems emerge, as to making the practice and the art of the best *lawyers* more communicable, and as to the law itself, and how it is working. Further laboratory and other work is under way, by many hands. The results will, most of them, have to be read as suggestive rather than as conclusive, as has always been the way of Jurisprudence. But a fresh, needed, vital current is flowing—flowing with more vigor, more volume, more effect as every year goes by. The newer Jurisprudence is just beginning. Writers who are "discovering" that this newer Jurisprudence is coming to "shift its ground" have, I fear, never understood the ground on which it started work. But that makes little difference. The work goes on. And sometimes its material makes good reading, just as such.

27. An Imaginary Judicial Opinion, 44 Harv. L. Rev. 889 (1931). The full bearing of the Imaginary Opinion, in wisdom and beauty balanced and restrained, is presented in Some Aspects of American Constitutional Law, 53 Harv. L. Rev. 529 (1940).

28. 23 Virginia L. Rev. 38 (1936).

29. 5 U. Chi. L. Rev. 171 (1938).

30. Kent's Commentaries, Columbia Law School, 1938. And there is admirable material in the little circulated Harvard Law Revue, and the Yale Law Jumble, as they spasmodically appear.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Attorney Must Testify in Court Investigation of Alleged Unethical Practices

THE Richmond County Bar Association filed a petition in the Supreme Court of New York, Appellate Division, Second Department, alleging the existence of "ambulance chasing" and its injurious consequences to litigants and its discredit of the Bar. The Court ordered a confidential inquiry by the Supreme Court at a Special Term. A member of the Bar for ten years was requested to appear and testify. He appeared but, prior to any interrogation, stated that he would answer no question, furnish no information and not waive immunity. He was then sworn. When he persisted in his refusal to give information, the Court asked:

> "Does the Court understand your position to be that you decline to answer any question in regard to this investigation in connection with your activities in the practice of law in Staten Island, on the ground that those answers will tend to incriminate or degrade you?"

Respondent replied:

> "Precisely so."

Thereafter charges of professional misconduct, embodying his conduct before the Special Term, were prosecuted against him. *In re Ellis*, 17 N. Y. S. (2d) 800. The respondent was suspended from practice for six months, the presiding justice dissenting. The majority said:

> "Obviously it was the duty of attorneys practicing in Richmond County, when requested, to aid the court in its investigation. Their 'co-operation with the court was due, whenever justice would be imperiled if co-operation was withheld . . . Co-operation between court and officer in furtherance of justice is a phrase without reality, if the officer may then be silent in the face of a command to speak.' *People ex rel. Karlin v. Culkin*, supra, 248 N. Y. at page 471, 162 N. E. at page 489, 60 A. L. R. 851. Without their co-operation the inquiry would be both futile and abortive. Respondent and the others mentioned not only failed to co-operate with the court but did their utmost to thwart the investigation. They thereby impeded the court in its effort to sustain the honor of the profession and protect the public in its dealings with its members.
>
> "Respondent contends that he had a right to assert his privilege. We hold that not every witness is entitled to remain silent as soon as he invokes his constitutional privilege against self-incrimination. Any witness 'may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution.' *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 231, 38 N. E. 303, 306. No constitutional right is involved. 'No question of constitutional right to remain a member of an honorable profession arises when an attorney delays or impedes justice by the contumacious assertion of spurious privileges.'
>
> ". . . the minority finds that at the time respondent asserted his privilege he had fair reason to apprehend a possible criminal prosecution. In other words, he was acting in good faith. Even if it were possible to accept this premise, our conclusion would be the same. . . . The Presiding Justice deplores the attitude of the respondent and concedes that it was his duty, when summoned, to attend the inquiry and testify unreservedly. He contends, however, that respondent's defiance of the admitted power of the court is sanctioned by the fundamental law of the State. . . . We answer that there is no constitutional or statutory barrier which prohibits or prevents this court from vindicating its honor. The respondent seeks shelter behind these enactments and the minority holds that he is protected by them. We do not share this view. We recognize that respondent has a dual status; he is here not only as an attorney but as a citizen. We assume that all constitutional privileges enure to the benefit of lawyer and layman alike. Nor do we hold that any rights guaranteed to respondent as a citizen may be denied him because he is an attorney. If we did, the persuasive and decisive utterances of the distinguished jurists, quoted in the dissenting opinion, would be pertinent. Here there is no constitutional right involved. Respondent has no constitutional or statutory right to his office of attorney. Membership in the Bar is not a right, but a privilege; 'a privilege burdened with conditions.' A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. . .
>
> "The minority also relies on the following sentence from the opinion in *People ex rel. Karlin v. Culkin*, supra, 248 N. Y. at page 471, 162 N. E. at page 489, 60 A. L. R. 851: 'We are now asked to hold that, when evil practices are rife to the dishonor of the profession, he may not be compelled by rule or order of the court, whose officer he is, to say what he knows of them, subject to his claim of privilege if the answer will expose him to punishment for crime.'
>
> "It is stated the above sentence means that a lawyer who asserts his constitutional privilege has not offended the dignity or power of the court. We respectfully disagree. The Court in the Karlin case, supra, did not decide the question whether the assertion in good faith of the privilege against self-incrimination is ground for disbarment. This is clear because three years later, in the Levy case, supra, the court said it was unnecessary to consider that question, and six of the judges who sat in the Levy case sat in the Karlin case. Moreover, in the Karlin case the respondent did not claim his privilege. He challenged the power of the court to direct a general inquiry into the conduct of its officers. The court held his refusal to testify was a contempt.
>
> "It is also suggested that the distinguished jurist who wrote in the Karlin case could not have meant that one may claim the privilege as a matter of right and yet have done a wrong which subjects him to discipline. With due respect, we believe the writer meant just that, because he stated: 'There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law.' The writer also knew that 'The courts have repeatedly held that the constitutional privilege does not apply where the testimony sought to be elicited may lead to disbarment.' . . .
>
> "We cannot agree that the Constitution of the State of New York has created a standard of duty for attorneys and that it has given respondent the right to do what he has done. This court has power and control over attorneys, and may censure, suspend from practice or remove from office any attorney guilty of professional misconduct or any conduct prejudicial to the administration of justice. Judiciary Law, §88, subd. 2. It is for this court to fix the standard of duty for its officers and to say what constitutes professional misconduct. We are neither diffident in defining that duty

nor hesitant in pronouncing the policy which hereafter will be followed. If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer the court's questions on the ground that his answers would tend to incriminate or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred."

Fraud Upon Court Leads to Lawyers Suspension

An attorney had represented a man and a woman charged with the crime of adultery. The man was convicted and the woman pleaded guilty. Two years later, he represented the woman as plaintiff in a divorce suit. The libel contained the following statement: "That during said coverture the said libellant on her part has faithfully kept the marriage covenant and performed all the duties appertaining thereto." It was subscribed to by the woman and sworn to before her attorney as notary public. The libellee did not appear at the trial and a divorce was granted. The attorney did not advise the Court of the criminal cases and asked his client no questions which might reasonably have been expected to elicit information concerning them. Under the law of Vermont, uncondoned adultery is a bar to divorce on any ground. When these facts were brought to the Court's attention the decree of divorce was stricken from the record and an entry made of "Libel Dismissed."

When the attorney appeared before the Court for questioning, he stated that he did not understand that under the circumstances his client [Avis Flint] was not entitled to a divorce, and further stated that he had given no thought whatever, as her attorney in the divorce case, to the fact that she had pleaded guilty to the charge of adultery. He also stated to the Court that:

> "Judge Adams refused to assign counsel to represent the said Avis Flint in the said criminal case at the expense of the state unless she would plead guilty."

The Court in its opinion said:

> "The Commissioner found that this statement was made by the respondent knowingly in an attempt to justify, as far as possible, the fact that he had appeared as an attorney for Avis in the divorce proceedings and had failed to in any way mention the criminal case wherein she had pleaded guilty to the crime of adultery. It was also found that the statement was false and was known to be false by the respondent at the time he made it. At the hearing before the commissioner the respondent stated that this statement was false and offered his apology for having made the same.
>
> "No citation of authorities, of which there is abundance here and elsewhere, need be given to demonstrate that this case is one which calls for disciplinary action of some sort. The permitting by the respondent of Mrs. Flint to take oath to the libel containing the false statement that she had faithfully kept the marriage covenant when he knew it to be false, together with his filing of the libel and suppression of the truth at the hearing was highly reprehensible, as was his false assertion as to what Judge Adams had said. The oath which an attorney takes when admitted to practice commences as follows: 'You solemnly swear that you will do no falsehood, nor consent that any be done in court.' It is apparent that the respondent violated these provisions of his oath as well as others contained therein. His whole course of conduct in respect to the false statement in the libel and the trial of the case in court tended to pervert and obstruct justice. There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it necessary, under any circumstances, for him to practice, or permit to be practised, a fraud upon the court.
>
> ". . . The commissioner did not find as a fact that the respondent was ignorant of the law as his said statement tended to show. We are giving him, however, the full benefit of the import of his statement and assume such was the fact. Although such ignorance cannot excuse his actions in respect to the divorce case, for though he may not have appreciated the importance of said statement in the libel he knew that it was false and should have had it stricken out whether to his mind it was or was not material to the issue and fully informed the court of the facts, it does tend to mitigate the seriousness of his conduct in respect to the case. We have also noted in his favor his apology for his statement concerning Judge Adams and under the circumstances are inclined to be lenient in our disposition of the instant case and suspend rather than disbar." *In re Goodrich*, 11 A. (2d) 325.

Indiscriminate Use of Word "Court" May Be Prohibited in New York

The indiscriminate use of the term "Court" is thought in New York to have become a menace to the public; it has frequently been used on the radio and otherwise in a manner calculated to mislead.

At the request of the Chairman of the Committee on State Legislation of the New York County Lawyers' Association, and with the consent of that Association, a bill has been introduced amending Section 3 of the Judiciary Law so as to prohibit the use of the term "court" as a part of or in connection with or in referring to the name of any body, board, bureau, association, organization or corporation "in such manner as to be calculated reasonably to lead to the belief" that such body is invested with judicial power or is part of the judicial system of the state. The bill also amends Section 9 of the General Corporation Law so as to prohibit the use of the word "court" in a corporate charter.

Volunteer Lawyer Service Deemed Success in New York

The senior and junior panels of volunteer lawyers to handle indigent prisoner cases in the criminal courts have functioned with notable success, according to the annual report of Harrison Tweed, president of the New York Legal Aid Society.

Mr. Tweed noted a substantial increase in the number of clients who sought the society's services in 1939, the total being 33,895, or more than 100 for each working day and stated that there was an impressive and significant rise in the number of cases handled in the criminal courts.

Referring to the volunteer panels, he recalled that almost everyone predicted at first that the plan would not last, but said "the system has been going on for two years and is still going strong." The juniors, the report states, were so interested in the experience they gained in the criminal courts that they have been perfecting a kind of "alumni organization."

Mr. Tweed stated that failure of the legislature to appropriate sufficient funds for the State Labor Department to handle wage claims has resulted in burdening the society with matters that should be taken care of by the State.

The society has successfully opposed legislation to repeal the provision that not more than 10 percent of a wage payment may be garnisheed by a creditor-assignee, according to the report.

The society has operated for three years without a deficit, Tweed said, but he warned that "the margin

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE Life of Mr. Justice Swift, by E. S. Fay. 1939. London: Methuen. Pp. 287.

Stage and Bar: Recollections of George Pleydell Bancroft. 1939. London: Faber. Pp. 343.

These Meddlesome Attorneys, by Edward Bell. 1939. London: Martin Serber. Pp. 330.

From the viewpoint of the general reader each of these books is ephemeral.

The first is the biography of a judge who was not one of the great judges of his day, and whose memory is thus perpetuated because no high court judge escapes the biographers. The second is the recollections of a barrister who became a playwright and clerk of assize for the Midland Circuit. The third is the reminiscences of a solicitor of the first rank.

The lay reader—to borrow a term—will find in them something more than the oft told tales of sensational English trials and that native British product, judicial wit. The two volumes of reminiscences will open for him windows through which he can see a certain segment of English life with a clarity infrequently apparent elsewhere.

George Pleydell Bancroft was the son of an English actor and actress, Sir Squire and Lady Bancroft, who before her marriage was Marie Wilton. From boyhood he knew intimately all the leading English actors and actresses of his generation.

Starting with Sir Henry Irving and Ellen Terry (to each of whom he devotes a chapter) he chats about them and shows them to us photographed in the costumes of their most successful plays. Included are Forbes-Robertson, J. L. Foot, Julia Neilson, Mary Anderson, E. S. Willard (whose David Garrick thrilled us when we were young), Charles Hawtry, (remembered by many of us in that delightful play, *Lord and Lady Algy*) and many others.

Lawyer and Playwright

Being himself a playwright (his play, *The Ware Case*, based upon a trial which he witnessed, was a success) Mr. Bancroft writes also of his fellow craftsmen. Some Gilbert and Sullivan fans will read with satisfaction: "The odd thing was, that in spite of his famous association with Sullivan, he (Gilbert) had no ear for music at all. He could recognize the National Anthem only by the rhythm of its beat" (p. 101).

These vignettes of actors, actresses and authors will bring to this book a wider circle of readers than either of the other two will command.

There is a perennial crop of biographies and autobiographies of English justices and barristers, but so-

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PROFESSIONAL ETHICS

(Continued from page 427)

of escape has been very narrow." He reported that law firms had contributed last year $62,449, lawyers $12,387 and laymen $10,905.

A One-Man Legal Aid Clinic Now

The Committee on Professional Ethics and Grievances has disapproved free legal aid enterprises unconnected with or unsponsored by bar associations, because an obvious part of the proponent's purpose, in each case, was, by publicizing free legal aid to poor people, to attract some who were able to pay fees. To meet the objection that such persons would impose on the proponent, it was stated that each applicant who applied for free services would be investigated and a proper fee charged if he was found able to pay. This proposed precaution was revealing.

Now it appears that an office is to be opened for free legal advice to the poor in New Brunswick, New Jersey, by a practicing lawyer, who is also police recorder in the nearby borough of Highland Park. Most so-called free legal aid organizations require a nominal fee for applicants, but it is announced that no charge whatever is to be made in this "clinic." The attorney will conduct and support the enterprise himself and devote two evenings a week from 8 to 10 o'clock to the work. Concerning this plan, he has said:

"The reaction to this idea has been favorable. At first a small group of lawyers objected because they felt that people would come to the clinic who would otherwise consult a private attorney. But after it was made clear that petitioners at the clinic would be asked to prove their inability to pay regular lawyers' fees, the objections were withdrawn."

Expressing the belief that the plan, if properly supported, will benefit the profession and the machinery of justice, he said:

"The courts are crowded with cases that should never reach the dockets at all. Many of these result in judgments for the plaintiff by default. The defendant has no money to employ a lawyer, sometimes he doesn't even understand the complaint, and he can't present a defense. The magistrate must hand down a verdict based on the facts at hand, and often he is required to attach the wages of the defendant in cases where, if proper advice were given, such a step could be avoided."

When public sentiment has crystallized with regard to the experiment, the attorney announces, he intends to present his record to the Middlesex Bar Association and to a group of local attorneys and ask them to extend the service throughout the city.

It is regrettable that such an enterprise does not have the sponsorship of the Middlesex Bar Association from its beginning.

THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,

H. W. ARANT, *Chairman.*

licitors have few remembrancers. Yet in this instance the solicitor's book is the best of the three, though its subject matter has less intrinsic interest for those without the bar than has that of Bancroft.

The title is accusatory. The preface is the plea. It consists of two words, "Not Guilty" (p. 6). This light touch pervades almost every page. Perhaps it is this that lends a charm to his style which is enhanced by his use of words which, though unusual, carry his meaning with a precision and verve rarely found.

Some of us, long in practice, have often speculated upon the amazement that would be reflected in the faces of our fellow townsmen if we should tell all we know. Mr. Bell does not tell all he knows. But with great candor he writes of those for whom the curtain has fallen. Upon reflection he has modified the injunction "Nothing but good of the dead." His volume is a source book for a shelf of realistic stories dealing with a certain phase of English life.

Such things the general will find and relish in these three volumes. For those of the profession who are interested in the functioning of the English courts they have a deeper significance.

English Justice

The results attained in the administration of justice in the English courts are frequently held up to us as the goal for which we should strive. Broadly speaking, these results are usually excellent—probaby far better than we have yet been able to attain. Their value has usually been buttressed by general statements, reinforced by statistics.

An ideal assessment of the worth of the English system as compared with ours could only be made by a disinterested lawyer who had had long experience in both.

This is too much to hope for. Next best would be a competent study by an experienced American lawyer who had observed the English courts in action. Even such observation would not be enough. It would disclose only the official surface. It would need to be supplemented and humanized by contact with English solicitors and barristers. Even then he would be fronted with British reserve.

Books such as these (and there are many of them) comprise the best source of knowledge of what the English really think of their courts and wherein they find their imperfections.

Space permits only of illustration, not particularization.

Judge Misdirects: Prisoner Discharged

Swift will be long remembered for what has come to be known as "the Woolmington misdirection." The charge was murder. Swift told the jury: "If once you find that a person has been guilty of killing another, it is for the person who has been guilty of the killing to satisfy you that the crime is something less than the murder with which he is charged." The House of Lords reversed, holding that the burden of proof was, at all stages, on the Crown and the prisoner went free. To an Englishman the interest in the decision resulted from the fact that it overturned a long accepted rule. Our astonishment came from the fact that the accused was discharged. This resulted from the fact that in England an appeal in a criminal case never means a new trial. The sentence may be modified by being diminished or increased but the conviction is either affirmed or reversed with the consequent enlargement of the defendant.

MR. JUSTICE AVORY
(From Bancroft's *Stage and Bar*. Faber. 1939)

The most potent factor in British justice is the ubiquitous influence of the judge. Rarely, indeed, even in jury trials, is there a result other than the one he desires. Each of these volumes tacitly testifies to the potency of his influence. Moreover, Mr. Bell points out that now "all cases except libel, fraud, or because of 'very special circumstances' must be tried by a judge alone . . . it is in the discretion of the judge whether or not a jury shall be allowed to try an ordinary civil case," (pp. 208 and 217).

This and other features of the system as it actually works leave upon an American lawyer the impression that notwithstanding the progress of democracy the administration of justice in England, as admirable as in many ways it is, remains a class affair.

This impression is deepened by the survival of the circuit system, to the description of which with its accompanying pageantry Mr. Bancroft, a Clerk of the Assize, naturally devotes much space. To us it is an anachronism that a city like Manchester should be in the eyes of the law merely an "Assize town."

Heavy Court Costs

Another feature of the English system that seems to us shocking is the high scale of taxable costs. Not infrequently has bankruptcy resulted because of the costs taxed in a single case. Indeed, it is a common saying in England that only two classes can afford to litigate—millionaires and paupers.

These are merely illustrations which could be multiplied. They are not spelled out in any one of these

volumes. They are all the more impressive because we are told of the reactions of individuals to their impact.

Improvements Suggested

Only Mr. Bell is in the least didactic and he only in his last chapter—"The Future of the Law." He suggests: the decentralization of the system; an increase from three to five members of the Court of Appeal and the abolishment of appeals to the House of Lords; the lessening of taxable costs; the broadening of the jurisdiction of the county courts; the definition of all crimes by statute; and other changes.

Both those who would without discrimination accept, and those who would without hesitation condemn, the English system would do well to read books such as these. In them they can see the system as it affects the individual human being. They give a more objective picture than can be envisaged by personal observation or contacts with active solicitors and barristers. This because the happenings they relate are so near as to be apposite and yet remote enough for the veil of reticence to have divided.

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Professor Spencer, who himself has sat as such a referee, describes the way in which these Boards work. He points out that referees have been called in about 33 per cent of the cases and notes the difficulty which arises from the fact that they usually act in particular cases only and therefore tend to lack thoroughgoing knowledge of the problems involved. In spite of this particular criticism, however, he opposes the creation of a permanent impartial Chairman. For it seems to Professor Spencer that the bias which exists more or less inevitably towards the point of view of management or labor becomes less harmful when held by a number of persons than by a single permanent official. And, as a possible improvement upon the existing machinery, he suggests that referees be selected from a permanent panel to be appointed by the President.

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Antitrust Enforcement Through Consent Decrees, by Maxwell Isenbergh and Seymour Rubin, in 53 Harvard L. Rev. 386. (Jan., 1940).

The consent decree has its dangers but nevertheless it is a valuable device that should be helpful in the present revival of interest in the enforcement of the antitrust law. The prosecution of the three large automobile companies and others for their methods of financing the purchases of automobiles receives particular attention. The late Judge Geiger, who would have nothing to do with a grand jury investigation while negotiations for consent decrees were pending, was wrong. He accomplished no more than to obtain some bad personal advertising and a transfer by the government of the litigation to another district. Then consent decrees against the Ford and Chrysler companies were entered and prosecutions against these companies were dismissed. General Motors did not "consent" and it was convicted. However the individual co-defendants were acquitted. The most novel feature about these particular consent decrees is the provision by which other finance companies may register with the district court. Thus they agree to a specified standard of good conduct and in exchange obtain services equivalent to those which the parent companies furnish to their affiliated companies. This device may develop into "the comprehensiveness of an NRA code."

PRACTICE

Special Verdicts Under the Federal Rules, by Abner Eddins Lipscomb, in 25 Washington U. L. Qu. 185. (Feb., 1940).

A brief general history of the form of the verdict gives special attention to reforms in Wisconsin, Texas, and North Carolina. The effort has been to get away from general verdicts, which require too much for a jury and give it an opportunity to conceal its prejudices. The new federal rules provide for two things: (1) require a jury to return *only* a special verdict upon each issue of fact, with a general discretion vested in the trial court as to the form in which this is done; or (2) the court may submit forms for a general verdict with written interrogatories "upon one or more issues of fact the decision of which is necessary to a verdict." Apparently, there is no right in either party to demand a special verdict; it seems to be a matter within the discretion of the court. Trouble is anticipated over the provision requiring "a written finding for each issue of fact." A special verdict on every issue of fact frequently makes the verdict unwieldy. State courts have struggled with this problem and have limited the requirements to "ultimate fact issues." Attention must be given to the form of the questions in order to submit the case fairly. Probably the most expedient practice is to submit brief questions calling for brief answers. Thus, the "modified special verdict" under Rule 49 (a) relieves the trial judge of the difficult and hazardous task of charging the jury on the law and relieves the jury of attempting to understand the law. It will confine itself to answering definite questions of fact.

NEW BAR JOURNAL

Volume one, number one (72 pages) of *The Alabama Lawyer,* the official organ of the State Bar, has just appeared. It is a quarterly. The editor is Judge Walter B. Jones, Montgomery, Alabama.

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TRADE REGULATION

Antitrust Enforcement Through Consent Decrees, by Maxwell Isenbergh and Seymour Rubin, in 53 Harvard L. Rev. 386. (Jan., 1940).

The consent decree has its dangers but nevertheless it is a valuable device that should be helpful in the present revival of interest in the enforcement of the antitrust law. The prosecution of the three large automobile companies and others for their methods of financing the purchases of automobiles receives particular attention. The late Judge Geiger, who would have nothing to do with a grand jury investigation while negotiations for consent decrees were pending, was wrong. He accomplished no more than to obtain some bad personal advertising and a transfer by the government of the litigation to another district. Then consent decrees against the Ford and Chrysler companies were entered and prosecutions against these companies were dismissed. General Motors did not "consent" and it was convicted. However the individual co-defendants were acquitted. The most novel feature about these particular consent decrees is the provision by which other finance companies may register with the district court. Thus they agree to a specified standard of good conduct and in exchange obtain services equivalent to those which the parent companies furnish to their affiliated companies. This device may develop into "the comprehensiveness of an NRA code."

PRACTICE

Special Verdicts Under the Federal Rules, by Abner Eddins Lipscomb, in 25 Washington U. L. Qu. 185. (Feb., 1940).

A brief general history of the form of the verdict gives special attention to reforms in Wisconsin, Texas, and North Carolina. The effort has been to get away from general verdicts, which require too much for a jury and give it an opportunity to conceal its prejudices. The new federal rules provide for two things: (1) require a jury to return *only* a special verdict upon each issue of fact, with a general discretion vested in the trial court as to the form in which this is done; or (2) the court may submit forms for a general verdict with written interrogatories "upon one or more issues of fact the decision of which is necessary to a verdict." Apparently, there is no right in either party to demand a special verdict; it seems to be a matter within the discretion of the court. Trouble is anticipated over the provision requiring "a written finding for each issue of fact." A special verdict on every issue of fact frequently makes the verdict unwieldy. State courts have struggled with this problem and have limited the requirements to "ultimate fact issues." Attention must be given to the form of the questions in order to submit the case fairly. Probably the most expedient practice is to submit brief questions calling for brief answers. Thus, the "modified special verdict" under Rule 49 (a) relieves the trial judge of the difficult and hazardous task of charging the jury on the law and relieves the jury of attempting to understand the law. It will confine itself to answering definite questions of fact.

NEW BAR JOURNAL

Volume one, number one (72 pages) of *The Alabama Lawyer,* the official organ of the State Bar, has just appeared. It is a quarterly. The editor is Judge Walter B. Jones, Montgomery, Alabama.

REVIEW OF RECENT SUPREME COURT DECISIONS

Patent Does Not Confer Right to Exploit a Business Not Included in the Patent—Bankruptcy Court Should Refer Disputed Land Title to State Court—Res Judicata in Drainage Assessment Proceedings—Excess Value of Improvements on Forfeited Leasehold Held Taxable Gain—Guarantor Does Not Fix Loss, for Income Tax Purposes, by Giving Note—Copyright: Apportionment of Motion Picture Profits from Infringements—State Supreme Court Asked to Clarify Its Opinion, to Show Whether State or Federal Constitution Involved—Not Unlawful for National Banks to Pledge Assets to Secure Deposits of Government Agencies—Cross-Claims Against United States—States May Tax Income of National Banks in the State—New York Estate Tax on Property Held by Donee with Limited Power of Appointment, Held Valid—City Sales Tax on Oil Imported Under Bond — Other Decisions

By Edgar Bronson Tolman*

Patents—Sherman Anti-Trust Law

The lawful monopoly granted to inventers by the patent law is limited to the right to exclude all others from manufacturing, using, or selling his invention, or to grant licenses to make, use, or vend but he may not by virtue of his patent, tie to the use of the patent device or process, the use of other processes or materials which lie outside of the patent licensed, or regulate the price of the patented article after it had been sold by the patentee or his licensee or exploit a business not embraced within the patent.

Ethyl Gasoline Corporation et al. v. United States of America, (84 Adv. Op. 559 Sup. Ct. Rep., No. 526, decided March 25, 1940.)

The Government brought this suit to restrain appellant, Ethyl Gasoline Corporation, a Delaware corporation, and others from granting licenses under patents controlled by it to jobbers and oil refiners restricting the sale of a patent fluid and a patent motor fuel, as violations of the Sherman Anti-trust Act. The trial court granted the injunction prayed for and the case was taken by direct appeal to the Supreme Court of the United States.

The case was tried on an agreed statement of facts. Appellant manufactured and sold a patented fluid compound containing tetraethyl lead which, when added to gasoline, increased its efficiency as a motor fuel in a high pressure combustion engine. It owned two patents covering the composition of that fluid, a third patent covering a motor fuel produced by mixing gasoline with the patented fluid, and a fourth patent claiming a method of using in combustion motors fuel containing the patented fluid.

Appellant manufactures and sells the patented fluid to oil refiners solely for use in the production of the improved type of motor fuel. It issues licenses under its patent to refiners and jobbers of motor fuel without royalty charges. Its profits are derived solely from the sale of the patented ethyl fluid to its refiner licensees.

The character of the licenses is peculiar and constitutes a controlling feature of the case. Most of the large oil refining companies in the United States are licensed by the appellant to manufacture, sell, and distribute motor fuel containing the patented fluid and appellant agrees to sell them their requirements of that fluid. The licenses prohibit licensees from selling the manufactured product to any refiner or jobber not licensed by appellant, or to retail dealers or consumers. The refiner is required to mix the patented fluid and the gasoline with equipment approved by appellant and in a specified manner for the prevention of injury to the public health. The refiners agree on notice by appellant to discontinue sales to other refiners or jobbers whose license appellant has cancelled. The proportions of the patented fluid to be mixed with the gasoline are specified and price differentials are fixed for the premium and non-premium grades. The former grade is designated "ethyl" and the latter is designated "regular." Gasoline jobbers are licensed to sell and deliver regular and ethyl gasoline manufactured and sold by a designated licensed refiner. Appellant is given the right to cancel jobbers' licenses at any time for failure to comply with their terms and either party may cancel on thirty days' written notice.

The effect of the licensing agreement on the oil industry is stated in the opinion by Mr. Justice Stone as follows:

> "The licensing system established by appellant affects and controls the business of the major part of those engaged in manufacturing and distributing motor fuel oil in the United States. Appellant issues licenses to 123 refiners, including every leading oil company except one, the Sun Oil Company, which does not generally do business through jobbers. They refine 88% of all gasoline sold in the United States, and the gasoline processed by them under the license agreements is 70% of all the gasoline thus sold, and 85% of all gasoline processed to obtain a high octane rating.
>
> "Any jobber in the United States desiring to sell lead-treated gasoline must secure a license from the Ethyl Corporation, revocable at its will, before it can procure the gasoline from licensed refiners. Of the 12,000 jobbers doing business in the United States approximately 11,000 are licensed by appellant. The jobber must procure a new license on changing his source of supply. . . .
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> "By their terms, the licensing agreements serve to exclude all unlicensed jobbers from the market, and in the particulars already mentioned, and in others presently to be discussed, they control the conduct of the business of licensed jobbers in the distribution of the patented motor fuel and enable appellant at will to exclude others from the business. The refiners' licenses

(Note: All Supreme Court decisions rendered from the recessing of Court on March 11, 1940, up to and including Monday, April 8, are reviewed or summarized in this issue of the Journal. On April 8 the Court recessed to April 22.)

*Assisted by James L. Homire and Leland L. Tolman.

also in terms place restraints on the sales price of refiners by establishing the prescribed differential between regular and ethyl gasoline. . . ."

The opinion calls attention to the undisputed fact that the patented material moves in great volume through the current of interstate commerce in every part of the country and it is shown that by the terms of the licensing agreements unlicensed jobbers may be excluded from the market and the licensed jobbers in the distribution of the patented material may be at will excluded from the business, and that restraints may be placed upon the sales price by the establishment of the prescribed differential between regular and ethyl gasoline.

As to the decision below Mr. Justice Stone said that the trial court found:

"That the appellant's licensing practices affecting the jobbers, in conjunction with the agreements and cooperation of the licensed refiners, had been used by appellant as the means of excluding from the market the unlicensed jobbers who do not conform to the market policies and posted gasoline prices adopted by the major oil companies or the market leaders among them, and that appellant uses the control thus established to coerce adherence to those policies and prices generally by the licensed jobbers, and that this restriction upon the industry effected through the license contracts with refiners and jobbers was not within appellant's patent monopoly, and operated unreasonably to restrain interstate commerce in the processed gasoline.

"It concluded that the licensing system was not, as appellant argues, necessary for the protection of such legitimate interests as the patentee had in the protection of the quality of the treated gasoline sold upon the market, and its use by the jobbers with safety to the public health. Appellants were accordingly enjoined from enforcing or attempting to enforce, or including in any subsequent agreement, provisions that refiners shall sell lead-treated gasoline only to licensed jobbers, and from requiring or attempting to require jobbers to secure licenses, and from enforcing or attempting to enforce the provisions of any outstanding jobber licenses. The decree also declared the jobber licenses illegal and required appellant to notify the jobbers that the licenses have been cancelled."

The contentions of the appellant were summarized as follows:

"Appellant, insisting that it does not use the jobbers' licensing system to maintain prices, makes two principal attacks on the decree. It urges that the licensing of the refiners and jobbers, the restraints upon the sale of the patented fuel by the refiners, and the restrictions placed upon the jobbers, are all reasonably necessary for the commercial development of appellant's patents and for insuring a financial return from them, and are therefore within its patent monopoly. In any case, it is said that the conditions attached to the refiners' and jobbers' licenses are appropriate and reasonably adapted to the maintenance of the quality of the product and for the protection of the public in its use of a product containing a dangerous poison, and both are essential to the maintenance of the market for the patented fuel, on which the market for appellant's patented fluid depends. And since the jobbers' licenses are a necessary or appropriate means of protecting the interests of appellant and the public in the quality and safe use of the patented product, it is argued that the decree abolishing the whole system of jobbers' licenses went further than was necessary or proper to prevent such restraint as there may have been exerted on the jobbers with respect to prices and marketing policies."

As to the relation of the licensing agreements to price maintenance the court said:

"While the trial court found no contract or agreement which purports to prescribe resale prices or to exact any price policy of the jobbers, the stipulation of facts shows that appellant, through its patents, its contracts, and its licensing policy, has acquired the power to exclude at will from participation in the nationwide market for lead-treated motor fuel all of the 12,000 motor fuel jobbers of the country, by refusing to license any of the 1,000 unlicensed jobbers, or by cancelling, as it may at will, the licenses of any of the 11,000 licensed jobbers. This we assume, for present purposes, it could lawfully do by virtue of the power conferred by its patent to exclude any or all others from selling the patented product. But it does not follow that it can lawfully exercise that power in such manner as to control the patented commodity in the hands of the licensed jobbers who had purchased it, or their actions with respect to it in ways not within the limits of the patent monopoly, and conspicuously among such controls which the Sherman law prohibits and the patent law does not sanction is the regulation of prices and the suppression of competition among the purchasers of the patented article. That appellant, by the plan and scope of its licensing policy, has acquired vast potential power to accomplish that end cannot be doubted. And we think the record supports the finding of the trial court that appellant has exercised that power continuously for a considerable period as a means of control over the price policies of the licensed jobbers."

One of the significant features of the license contracts in question was the provision that the application for license contracts might be rejected if upon investigation of the "business ethics" of applicants, the field agents of appellant made adverse reports. On this point the opinion says:

. . . "Appellant admits that the phrase 'business ethics' is used to denote compliance with 'marketing policies and prevailing prices of the petroleum industry,' which are the 'marketing policies and posted prices of the major oil companies or the market leaders among them.' Among these is the Standard Oil Company of New Jersey which owns one-half of the capital stock of the appellant. While not all applicants who have failed to maintain prices and marketing policies have been rejected, the record leaves no doubt that appellant has made use of its dominant position in the trade to exercise control over prices and marketing policies of jobbers in a sufficient number of cases and with sufficient continuity to make its attitude toward price cutting a pervasive influence in the jobbing trade.

"In many instances, although not in all, an adverse report by the investigator as to the applicant's business ethics has been the sole ground for rejecting his application, and appellant admits that the greater number of applications for licenses which have been denied were rejected because of such an adverse report. . . .

"These long-continued practices have had the effect upon the industry naturally to be expected. Large numbers of refiners and the majority of jobbers believe that the jobbers must maintain the required business ethics in order to obtain licenses, and a number of licensed jobbers believe that they are required by appellant's licensing practices to maintain prices and abide by the marketing practices of the major oil companies. Appellant, in its printed instructions to field representatives as to the manner of conducting investigations of licensed jobbers, after pointing out that one of the reasons for the investigation of the jobber before the issuance of the license is to insure that he 'will not resort to unethical methods in competing with our other licensed jobbers and refiners,' and after describing the methods of conducting the investigation, sums up the result as follows: 'We have, through these supplemental investigations, been able to correct the ethyl picture to a considerable extent, and have succeeded in eliminating from our jobber lists some of our former accounts who were not a credit to us as licensees of the Ethyl Gasoline Corporation.'"

After the foregoing review of the admitted facts with

regard to the character of the license contracts and their effect upon the limitation of competition and the fostering of monopoly, the learned justice summarized the law as to the scope of the patent monopoly and cited exhaustively prior decisions on that subject. With regard to the extent to which patentees might lawfully monopolize the manufacture, use, and sale of a patented invention the opinion seems to rest upon an unbroken current of prior authority rather than upon any new view of the law. The following quotations from which the citations have necessarily been omitted for lack of space, the conclusions of the court on this phase of the case can be seen:

> It is not denied, and could not well be, that if appellant's comprehensive control of the market in the distribution of the lead-treated gasoline, as disclosed by the record, had been acquired without aid of the patents, but wholly by the contracts with refiners and jobbers, such control would involve a violation of the Sherman Act. . . . And so we turn to the consideration of the patents and the patent law to ascertain whether the monopoly which they have given appellant affords a lawful basis for the control over the marketing of motor fuel which the record discloses. . . . In considering that question we assume the validity of the patents, which is not questioned here.
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> The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention. . . . He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give.
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> He may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes or materials which lies outside of the monopoly of the patent licensed; or condition the license so as to control conduct by the licensee not embraced in the patent monopoly, . . . or upon the maintenance of resale prices by the purchaser of the patented article. . . .
>
> Appellant, as patentee, possesses exclusive rights to make and sell the fluid and also the lead-treated motor fuel. By its sales to refiners it relinquishes its exclusive right to use the patented fluid and it relinquishes to the licensed jobbers its exclusive rights to sell the lead-treated fuel by permitting the licensed refiners to manufacture and sell the fuel to them. And by the authorized sales of the fuel by refiners to jobbers the patent monopoly over it is exhausted, and after the sale neither appellant nor the refiners may longer rely on the patents to exercise any control over the price at which the fuel may be resold. . . .
>
> The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price-cutters. . . . A very different scene is depicted by the record. It is one in which appellant has established the marketing of the patented fuel in vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contracts resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them. It seems plain that this attempted regulation of prices and market practices of the jobbers with respect to the fuel purchased, for which appellant could not lawfully contract, cannot be lawfully achieved by entering into contracts or combinations through the manipulation of which the same results are reached by the exercise of the power which they give to control the action of the purchasers. Such contracts or combinations which are used to obstruct the free and natural flow in the channels of interstate commerce of trade even in a patented article, after it is sold by the patentee or his licensee, are a violation of the Sherman Act. . . . Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, which is not only a prohibition against the infliction of a particular type of public injury but "a limitation of rights which may be pushed to evil consequences and therefore restrained."
>
> The extent to which appellant's dominion over the jobbers' business goes beyond its patent monopoly, is emphasized by the circumstances here present that the prices and market practices sought to be established are not those prescribed by appellant-patentee, but by the refiners. Appellant neither owns nor sells the patented fuel nor derives any profit through royalties or otherwise from its sale. It has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobber accrues primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, . . ., or for the exploitation or promotion of a business not embraced within the patent.

Questions were raised by appellant as to the propriety of those provisions of its licenses which it declared to be motivated by a desire to protect the public health in the use of deleterious substances which necessarily enter into the composition of its patented fluid but it was declared that the public health could be adequately protected without resort to the jobber license device.

In conclusion the court said:

> "Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. It could, in the exercise of its discretion, consider whether that could be accomplished effectively without dissestablishing the licensing system, and whether there were countervailing reasons for continuing it as a necessary or proper means for appellant to carry out other lawful purposes. Since the court rightly concluded that these reasons were without substantial weight, it properly suppressed the means by which the unlawful restraint was achieved. *Affirmed.*"

Mr. Justice MCREYNOLDS and Mr. Justice ROBERTS took no part in the consideration or decision of this case.

The case was argued by Mr. Dean G. Acheson for appellants and by Assistant Attorney General Arnold for the appellee.

Bankruptcy—Jurisdiction to Adjudicate Questions of Title

Bankrupty courts have summary jurisdiction to determine title to property in possession of the trustee as part of the bankrupt estate. Where fugitive oil under a railroad right of way is concerned the court may in its discretion,

pending the adjudication of title, order the oil captured, stored, or sold and the proceeds impounded for ultimate disposition in accordance with the final adjudication of ownership.

The ultimate right to sub-surface oil depends upon the law of the State in which the oil is found. When that question of law has not yet been conclusively decided it is appropriate for the bankruptcy court to submit the question to the highest court of the state for adjudication.

Thompson, Trustee, v. Magnolia Petroleum Company; Thompson, Trustee, v. Ohio Oil Company. (84 Adv. Op. 624, 60 Sup. Ct. Rep. 628, No. 481, decided March 25 1940.)

A dispute arose between the trustee of a railroad in reorganization under Section 77 of the Bankruptcy act, and certain oil companies, as to the right of the trustee to drill for and capture fugitive oil under the railroad's right of way which traversed the rich oil field discovered in Illinois in 1938. The right of the trustee was based upon long continued and undisputed ownership and possession of the right of way. The oil companies claimed the oil by contracts from the owners of the fee of the land over which the right of way ran.

The questions which arose were (1) whether the bankruptcy court had summary jurisdiction to adjudicate ownership of the right of way lands, (2) whether that court had abused its discretion in ordering the fugitive oil captured and its proceeds impounded pending the adjudication of the ownership, and (3) the ultimate ownership of the oil.

The bankruptcy court had found that the trustee was in actual possession of the property and claimed ownership or fee simple title thereto; and that immediate action was necessary to conserve the oil supply underlying the property. The trustee was directed to provide wells, production and sale of oil and impound the proceeds pending adjudication of ownership.

The Court of Appeals, Eighth Circuit, reversed with instructions to dismiss the trustee's petition, concluding that the railroad right of way was a mere easement and that the trustee's claim to fee simple ownership was erroneous. The Court of Appeals for the Seventh Circuit in which Illinois is located, held in a similar case that the title of the oil passed to the railroad company. Because of this conflict certiorari was granted.

As to the question of jurisdiction MR. JUSTICE BLACK delivering the opinion of the court said:

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. Here, the trustee succeeded to the physical possession custody and control of the right of way lands which the railroad had enjoyed at the time of bankruptcy. In fact, however, no one had, when the petition was filed, physical possession of the fugitive oil apart from the lands under which it lay. The Supreme Court of Illinois has said, 'The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found.' And this entire controversy can only be resolved by solution of the primary question of fee simple ownership. The parties agree that if ownership of the right of way lands is in the trustee he has the right to capture the underlying oil, and if not, that the trustee has no such right. Thus, the right to the disputed oil necessarily hinges upon where the ownership of the fee to these lands lies. And possession of those lands under claim of fee simple ownership by the railroad and later by the trustee was an adequate basis for the District Court's summary jurisdiction."

It was further held that it was not an abuse of discretion for the bankruptcy court to authorize the trustee, in an effort to protect all interests, to preserve the oil from waste and depletion through its extraction and sale and to impound the net proceeds until the final determination of the controversy.

As to the method of the determination of the law of the state in which the sub-surface oil was located, as to the ownership thereof, it was held that the question of law should be submitted for determination by the courts of Illinois rather than to undertake the solution of those doubtful and heretofore undetermined questions in the bankruptcy court. On this point it was said:

> "Decision with which the Federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme."

The judgment of the Circuit Court of Appeals was reversed and that of the District Court affirmed except that the District Court was directed to modify its order so as to provide for appropriate submission of the question of fee simple ownership of the right of way to the Illinois State Courts.

MR. JUSTICE MCREYNOLDS took no part in the decision. The case was argued by Mr. Thomas T. Railey for the petitioner, and by Mr. Craig Van Meter, and Mr. Thomas H. Cobles for the respondents.

Special Assessment—Drainage—Res Judicata

The judgment of a state court that a property owner has paid his full share of the benefits assessed upon his land derived from a drainage system, is res judicata in subsequent proceedings brought in the Federal court by the holders of certificates payable out of the assessments. Judgments against the drainage district and in favor of the certificate holders on unpaid certificates and decree to levy and collect assessments on all the land in the district, do not impair the effect of prior judgments relieving individual land owners from liability, as defenses of individual property owners are not thereby foreclosed.

Kersh Lake Drainage District v. Johnson (84 Adv. Op. 634, 60 Sup. Ct. Rep. 640, No. 595, decided March 25, 1940.)

The plaintiff corporation was organized under the drainage law of Arkansas. It levied an assessment to ascertain and apportion the benefits accruing to the lands in the district from the construction of the drainage system and issued interest-bearing certificates of indebtedness to pay for the cost of construction.

Respondent Johnson brought suit against the District in a state court to establish that he had fully paid his share of the assessment apportioned to his land. The state court decreed that the lien of the District for such taxes had been "fully satisfied and released" and enjoined further extension of drainage taxes against appellee's land.

Thereafter certificate holders obtained a judgment

against the district in the Federal Court for the Eastern District of Arkansas, for amounts due them on unpaid certificates. The Circuit Court of Appeals affirmed those judgments. The certificate holders then instituted proceedings in the same Federal court to compel the county clerks to extend drainage benefit taxes for the districts, and to collect the same by appropriate proceedings.

The District set up among other defenses that a large number of tracts of land in the district had fully paid the entire value of assessed benefits and had obtained decrees enjoining the commissioners from levying further taxes on lands where the assessed benefits had been fully paid.

The Federal court decreed that taxes of 6½% of the benefits assessed against each tract of land be assessed against all property owners in the drainage district and that steps be taken for the collection and enforcement of the decree. The decree also was affirmed by the Circuit Court of Appeals.

Drainage taxes were accordingly extended on the tax books but the respondent Johnson and others in whose favor the chancery court had decreed satisfaction of the lien of the original assessment, refused to pay. Suit was filed in the state court by the District. Johnson and other defendants, relying on the decree of the State court that they had paid their shares of the cost of the improvement, filed in the State court pleas of *res judicata.*

The District then alleged that the state decrees were void because the certificate holders had not been made parties and that the certificate holders' judgment against the District and the decree of the Federal Court were *res judicata* of all questions raised by the landowners. The trial court decided against the landowners but the Supreme Court of Arkansas reversed and held that the State Court decrees were conclusive adjudications that the particular lands therein involved were free from further benefit taxes, thus sustaining the landowners' plea of *res judicata.* The District petitioned for certiorari from the judgment of the Supreme Court of Arkansas and the writ was allowed.

As to the status and effect of the unappealed decrees of the State Chancery Court, Mr. JUSTICE BLACK delivering the opinion of the court, said:

> "As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the Chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment. Petitioners also add the contention that the 1932 State court decree was 'collusive as a matter of law.'
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> "Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors. Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District. And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of taxes due the District by virtue of drainage benefits received by the particular tracts here in question.
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> "When these certificates were issued, purchasers were charged with notice of and bound by Arkansas statutes in existence when, and pursuant to which, the debt was contracted and which provided for determination of the proportionate liabilities of lands in the District by Chancery proceedings between the Commissioners and landowners with no requirement of notice to creditors of the District. . . .
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> "These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue. And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion."

As to the judgments of the Federal District Court the opinion held that the refusal of the State courts to accept the District court judgment as determinative of the landowners' liabilities did not construe a denial of full faith and credit to those judgments.

On this point Mr. JUSTICE BLACK says:

> "In order that the District might be afforded a basis for suits in the State courts to recover taxes with which to pay the judgment against it, the District Court ordered a mandatory injunction requiring County officials to extend on their books drainage taxes against all the lands in the District as a whole, including those here involved. This preliminary to State court suits in which the actual respective liabilities of the individual landowners could be determined was performed, and thereby this provision of the injunction was carried out. The Commissioners were also enjoined to file and prosecute suits in the State courts to collect all such taxes that were delinquent. This was done. Irrespective of whether the District was empowered to represent the landowners when the extension of taxes as a whole was ordered, by its mandatory injunction the District Court did not attempt to foreclose the State court from hearing all matters of personal defense which individual landowners might plead in the suits for collection. Instead, the District Court appropriately left for the State court's determination any such personal defenses available under Arkansas law. And here the Supreme Court of Arkansas has sustained as personal defenses the decrees of payment and discharge obtained by individual landowners in Arkansas Courts of competent jurisdiction. . . .
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> The substantial effect of the District Court's judgments was no more than a determination that a total balance was still due the complaining certificate holders by the District; that drainage taxes sufficient to discharge this balance should be extended on the proper County tax books in accordance with Arkansas law; and that suits against individual landowners be filed for judicial ascertainment of their proportionate shares of the total. Neither the adjudication of the total liability nor the order for extension of drainage taxes on the local tax books was an adjudication of the varying proportionate liabilities of the respective landowners. Determination of these liabilities was properly left for the State court. A decreed total liability for the District was still consistent with the principle that 'when the

proportion [taxable against a particular tract] is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources.'"

Comment was made on the point raised by the district that the landowners were never served with process or heard in the certificate holders' suits and that no relief against them as individuals was either sought or adjudged but it was noted that the landowners have not asserted and the Supreme Court of Arkansas has not upheld any attack upon that judgment, which might be valid although uncollectible against the District or any individual landowner.

The judgment of the Supreme Court of Arkansas was affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision.

The case was argued by Mr. George B. Rose for the petitioners, and by Mr. Walter G. Riddick for the respondent.

Federal Income Tax — Taxable Gain Defined — Value of Improvements on Forfeited Leasehold as Income

Helvering v. Bruun. ——Adv. Op.——, —— Sup. Ct. Rep.——. [No. 479, decided March 25, 1940.]

Certiorari was granted here to determine whether the enhanced value of property due to the erection by a tenant of a new building upon leased land is a taxable gain of the lessor realized by him upon the forfeiture of the leasehold.

The facts are stated by MR. JUSTICE ROBERTS in the Court's opinion, as follows:

"On July 1, 1915, the respondent, as owner, leased a lot of land and the building thereon for a term of ninety-nine years.

"The lease provided that the lessee might, at any time, upon giving bond to secure rentals accruing in the two ensuing years, remove or tear down any building on the land, provided that no building should be removed or torn down after the lease became forfeited, or during the last three and one-half years of the term. The lessee was to surrender the land, upon termination of the lease, with all buildings and improvements thereon.

"In 1929 the tenant demolished and removed the existing building and constructed a new one which had a useful life of not more than fifty years. July 1, 1933, the lease was cancelled for default in payment of rent and taxes and the respondent regained possession of the land and building.

"The parties stipulated 'that as at said date, July 1, 1933, the building which had been erected upon said premises by the lessee had a fair market value of $64,245.68 and that the unamortized cost of the old building, which was removed from the premises in 1929 to make way for the new building, was $12,811.43, thus leaving a fair market value as at July 1, 1933, of $51,434.25. for the aforesaid new building erected upon the premises by the lessee.'

"On the basis of these facts, the petitioner determined that in 1933 the respondent realized a net gain of $51,434.25. The Board overruled his determination and the Circuit Court of Appeals affirmed the Board's decision."

The opinion then examines the contention of the taxpayer that the gain is not taxable since the enhanced value of the recaptured asset is not gain derived from capital or realized within the meaning of the 16th amendment and may not, therefore, be taxed without apportionment amongst the states, since it is not separate from the capital or separately disposable. As to this, the opinion points out that while economic gain is not always taxable as income, yet the realization of gain need not be in cash derived from the sale of the asset; but may occur as a result of exchange of property, relief from a liability or other profit realized from the completion of a transaction. Applying this test here, the opinon concludes that the receipt of the land in its enhanced condition upon forfeiture of the lease was an ascertainable increase in value amounting to taxable gain.

The CHIEF JUSTICE concurred in the result in view of the terms of the stipulation.

MR. JUSTICE MCREYNOLDS did not participate.

The case was argued on February 28, 1940, by Mr. Arnold H. Raum for the petitioner and by Mr. John H. McEvers for respondent.

Federal Income Tax—Deduction of Loss on Contract of Guaranty

Helvering v. Price. — Adv. Op. —, — Sup. Ct. Rep. —. [No. 559, decided March 25, 1940.]

Certiorari presenting the question whether a taxpayer who makes his return and keeps his accounts upon a cash basis, may, under § 23(e) of the Revenue Act of 1932, relating to deduction of losses sustained during the taxable year, deduct from his net income certain amounts for which he has in that year given his own note in payment of his liability under a contract of guaranty.

The opinion by Mr. CHIEF JUSTICE HUGHES summarizes the facts as follows:

"In 1929 the Atlantic Bank and Trust Company of Greensboro, North Carolina was merged with the North Carolina Bank and Trust Company. The latter accepted conditionally certain assets of the Atlantic Bank called "A" assets, and certain other assets, called "B" assets, were pledged to that Bank with authority to charge against them any losses which might be established in realizing upon the "A" assets. Respondent and three other stockholders of the Atlantic Bank executed an agreement of guaranty, to the effect that if the North Carolina Bank failed to realize a certain sum from the "A" assets within two years they would make up the deficiency in an amount not exceeding $500,000. The agreement provided that any sum realized from the "B" assets were to be applied first to any losses occurring in the "A" assets and then to the reimbursement of the four guarantors. The period for realizing upon the "A" assets was extended until September, 1932.

"In June, 1931, the North Carolina Bank advised the guarantors that the "B" assets were not in such shape that the Bank could use them to the extent necessary for banking purposes and requested the guarantors to put their guaranty into a bankable form so that it could be used by the Bank to obtain credit. Respondent accordingly gave to the Bank his note for $125,000 and endorsed the note of . . ., another guarantor, for a like amount and assigned certain securities to the Bank as collateral for the payment of his guaranty. The Bank agreed that respondent's ultimate liability should not exceed $250,000. At the end of 1931, the guaranty agreement was still in effect. The "B" assets were still in the process of collection. No demand had been made upon respondent. While it was known that there would be some loss to the guarantors, it was not definitely known in 1931 what the loss would be, and the guarantors had reason to believe that there would be a substantial reimbursement from the "B" assets of any losses.

"In the early part of 1932, . . . the Bank concluded that it would have to collect upon the guaranty and called upon respondent to make a final settlement of his obligations. Accordingly in March, 1932, respondent made his note to the Bank for $250,000 and received

back the two notes. The Board of Tax Appeals found that both respondent and the Bank considered this to be a final payment of the two notes which had been given under the guaranty. The Bank retained the same collateral for the $250,000 note that it had previously held, and in December, 1932, respondent substituted therefor certain securities of his own."

The taxpayer had urged that since the transaction in 1932 was considered by the parties to be a payment of his liability under the guaranty, and since this payment was a fact found by the Board of Tax Appeals, it is not open to review. This argument the opinion rejects with the observation that the findings of the board disclose the entire transaction, and its legal effect was reviewable.

The opinion then examines the case of *Eckert v. Burnet* (283 U. S. 140) and concludes that it is controlling; that as the return was on a cash basis, there could be no deduction in this year unless the substitution of the note constituted a payment in cash or its equivalent, and, since under the doctrine of the Eckert case the taxpayer's own note was not the equivalent of cash, nor was there any cash payment, the deduction was not allowable in the taxable year in question.

The opinion also states that the giving of collateral did not transform the promise of the note into the payment required to constitute a deductible loss in that year.

Mr. JUSTICE MCREYNOLDS took no part in the decision of the case.

The case was argued on March 5th and 6th, 1940, by Mr. George D. Brabson for respondent and by Mr. Richard H. Demuth for petitioner.

Copyrights—Apportionment of Profits Resulting from Infringements

In cases in which a copyright is infringed the holder of the copyright is not entitled to all profits derived by the infringer, but only to such portion thereof as are attributable to the infringement as distinguished from profits attributable to elements added by the infringer, if the evidence is sufficient to provide a fair basis of division of the profits. The testimony of expert witnesses is admissible in proof of the damages in cases of that character.

Sheldon v. Metro-Goldwyn Pictures Corp., 84 Adv. Op. 576; 60 Sup. Ct. Rep. 681 (No. 482, decided March 25, 1940).

This case involves questions of account under the Copyright Law dealing with the award of profits for infringement of a copyright. In the language of the CHIEF JUSTICE, who delivered the opinion of the Court, the issues are defined as follows:

> "The questions presented are whether, in computing an award of profits against an infringer of a copyright, there may be an apportionment so as to give to the owner of the copyright only that part of the profits found to be attributable to the use of the copyrighted material as distinguished from what the infringer himself has supplied, and, if so, whether the evidence affords a proper basis for the apportionment decreed in this case."

The respondents were found to have infringed petitioners' copyright covering a play entitled "Dishonored Lady" in a motion picture which respondents produced under the name of "Letty Lynton." The District Court awarded the petitioners *all* the net profits which respondents had received amounting to $587,604.37. The Circuit Court of Appeals reversed, holding there should be an apportionment of the profits and fixing the petitioners' share of the profits at one-fifth. On certiorari the latter ruling was affirmed by the Supreme Court.

The opinion points out that the District Court thought it punitive and unjust to award all of the net profits to the petitioners since the respondents had contributed other recognized and distinct elements toward the ultimate earning of the net profits and expressed the view that an allowance in excess of 25% of the profits would be to allow to the petitioners profits in no way attributable to the use of their play in the making of the picture. However, it felt itself bound by a ruling by the Circuit Court of Appeals in *Dam v. Kirk La Shelle Co.*, 175 Fed. 902, and allowed all the profits as damages. The Circuit Court of Appeals reduced the petitioners' share to one-fifth of the net profits in the view that that would favor the plaintiffs in every reasonable chance of error in computing the damages.

In reviewing the judgment, the Supreme Court rejects the petitioners' basic argument to the effect that there can be no apportionment of profits in a suit for the infringement of a copyright, since that is forbidden both by statute and by decisions of the Supreme Court. In rejecting this contention MR. CHIEF JUSTICE HUGHES says:

> ". . . We find this basic argument to be untenable.
>
> "The Copyright Act in Section 25 (b) provides that an infringer shall be liable—
>
> '(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just, . . .'."
>
> "We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and and the only question is as to their apportionment.
>
> "Petitioners stress the provision for recovery of 'all' the profits, but this is plainly qualified by the words 'which the infringer shall have made from such infringement' . . . This provision in purpose is cognate to that for the recovery of 'such damages as the copyright proprietor may have suffered due to the infringement.' The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement."

The Court observes that in the passage of the Copyright Act Congress apparently intended to assimilate the remedy as to the recovery of profits to that already recognized in patent cases both by statute and in court decisions. After a reference to the decisions of the Supreme Court in *Callaghan v. Myers*, 128 U. S. 617, and *Belford v. Scribner*, 144 U. S. 488, wherein it had been found impossible to separate the profits due to elements added by the infringer from those attributable to the infringement of the patent, the opinion states the following conclusions as to the rule deduced from the statute and the relevant judicial decisions:

> "We agree with the court below that these cases do not decide that no apportionment of profits can be had where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him. Both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits 'which the infringer shall have made from such infringement.'"

The opinion then cites various decisions in patent cases as analogies in support of the view that an apportionment of the profits should be made where the evidence enables that to be done.

In conclusion, the admission of testimony by expert

witnesses as to the amount of damages is approved.

MR. JUSTICE MCREYNOLDS took no part in this case.

The case was argued by Mr. Arthur F. Driscoll for the petitioners, and by Mr. John W. Davis for the respondents.

Procedure—Practice on Appeal Involving State and Federal Constitutional Questions

Where a state statute is adjudged invalid by the court of last resort of the state and it is uncertain whether the invalidity is predicated on the state or federal constitution, the proper practice is to remand the cause to the state court for the elimination of uncertainties as to the basis for the decision, in order that the state and federal courts may keep within the limits of their respective jurisdictions.

Minnesota v. National Tea Co., 84 Adv. Op. 571; 60 Sup. Ct. 676 (No. 500, decided March 25, 1940).

In this case the Court had under review a decision of the Supreme Court of Minnesota adjudging invalid the 1933 Minnesota Chain Store Tax, which includes a provision taxing gross sales. The gross sales tax under the law is graduated so as to impose a tax of 1/20% on the proportion of gross sales not in excess of $100,000.00, with increasing rates on larger sales until 1% is exacted on gross sales in excess of $1,000,000.00.

In adjudging the tax unconstitutional the Supreme Court of Minnesota alluded to both the equal protection clause of the Fourteenth Amendment to the Federal Constitution and Art. 9, § 1, of the Minnesota Constitution which provides: "Taxes shall be uniform upon the same class of subjects. . . ."

On certiorari, the judgment was reversed by the Supreme Court by a divided bench, MR. JUSTICE DOUGLAS delivering the prevailing opinion. The reason for the reversal is that it is uncertain as to the precise ground on which the State Court rested its decision, whether on the quoted provision of the State Constitution or the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

In view of this uncertainty the Supreme Court took the position that the proper procedure for disposition of the case would be to remand it to the State Court for further proceedings to enable that Court to separate the state and federal questions involved and the decision thereof. The importance of following such procedure in order to preserve the respective jurisdictions of the State and Federal Supreme Courts is emphasized by MR. JUSTICE DOUGLAS in the following portion of the opinion:

> "It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

MR. CHIEF JUSTICE HUGHES delivered a dissenting opinion in which MR. JUSTICE STONE and MR. JUSTICE ROBERTS concurred. In this opinion the CHIEF JUSTICE expresses the view that the record leaves no uncertainty as to what actually had been determined by the State Court, and that that Court had held that the challenged tax was levied in violation of the uniformity clause of the Minnesota Constitution. Emphasizing that similarity or identity of the State and Federal constitutional provisions does not justify disturbing a judgment of the State Court adequately rested upon a provision of the State Constitution, MR. CHIEF JUSTICE HUGHES says:

> "The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provision of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the federal constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand."

MR. JUSTICE MCREYNOLDS took no part in the case.

The case was argued by Mr. Matthias N. Orfield and Mr. George W. Markham for the petitioner, and by Mr. Michael J. Doherty for the respondents.

National Banks—Power to Pledge Assets to Secure Deposits of Government Agencies

National banks are empowered to pledge their assets to secure the deposits of funds of agencies of the United States, such as the Inland Waterways Corporation, the United States Shipping Board Merchant Fleet Corporation, and the Secretary of War on behalf of the Canal Zone.

Inland Waterways Corp. v. Young, 84 Adv. Op. 628; 60 Sup. Ct. Rep. 646 (No. 6, decided March 25, 1940).

In this case the Court had before it a question whether a national bank may pledge assets to secure deposits of funds made by governmental agencies, even though they may not be "public money" within the meaning of § 45 of the National Banking Act. The agencies were the Inland Waterways Corporation, the United States Shipping Board Merchant Fleet Corporation (both wholly owned by the United States) and the Secretary of War on behalf of the Panama Canal Zone.

The question arose in insolvency proceedings of the Commercial National Bank of Washington, D. C., in a suit by the bank's receiver to recover pledged assets to the extent of the amount in excess of dividends paid to general depositors. The District Court and the Court of Appeals ruled for the receiver.

On certiorari the judgments were reversed by the Supreme Court, by a divided bench. MR. JUSTICE FRANKFURTER delivered the prevailing opinion. He adopts the recent opinions of MR. JUSTICE BRANDEIS in *Texas & Pacific Ry. v. Pottorff*, 291 U. S. 245, and

Marion v. Sneeden, 291 U. S. 262, as a starting point, and recognizes that they deny to national banks the power to pledge their assets to secure deposits by state and local governmental agencies, except as permitted by the Act of June 25, 1930.

It is observed, however, that the function of national banks as depositories of federal moneys was not before the Court in those cases, and that the banks' power as to federal funds was not in issue there. An examination of the history and purposes of the statute and the government's traditional policy in using the national banks as fiscal agencies then follows, from which it is concluded that the banks have power to pledge assets to secure the deposits of the governmental agencies involved.

Emphasis is placed on the fact that the policy of securing government deposits antedated the National Banking Act and that that Act is to be considered in view of the earlier practice. As to this MR. JUSTICE FRANKFURTER says:

> "The policy of securing Government deposits thus antedates the National Banking Act. It was the practical response to disastrous experience. It began without any statutory authorization, and was continued both with and without specific Congressional sanction. Long practice and Congressional approval lodged in the Secretary of the Treasury authority to take appropriate measures to safeguard the nation against loss of its funds. The integrity of Government monies was naturally considered an object of great national importance, the attainment of which properly belonged to those entrusted with their disposition.
>
> "It is against this background that the National Banking Act of 1864 must be projected, intended as it was to provide facilities for the deposit of Government funds. Congress was alive to the Treasury's experience with deposits, secured and unsecured, during the preceding decades, together with the policy which had evolved from that experience . . . The banking system which Congress thus established embodied a blend of governmental and private purposes. . . . .
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> "By §45 of the Act, Congress specifically commanded the Secretary of the Treasury to exact security for 'public monies' deposited by him in national banks. . . . . We read this as an exaction of duty from the Secretary as to monies subject to his control, . . . and not as a limitation upon the power of the bank to give security when it may be required by other Government officers and agencies charged with the custody of federal funds. Placing §45 in the setting of its history, we do not think it should be read in a niggardly spirit, as though it expressed a gingerly departure from public policy. On the contrary, it is a manifestation of historic national practice, which is to be given scope consonant with the reason for its development. . . . By a series of specific statutory commands, Congress has recognized the power of national banks to give security for deposits of a governmental nature by laying upon various agencies, charged with the custody of such funds, a duty to exact collateral. See §61 of the Bankruptcy Act, 30 Stat. 562; §9 of the Postal Savings Act, 36 Stat. 816; and Acts relating to insolvent Bank Funds, 39 Stat. 121; Porto Rican Funds, 39 Stat. 951; Government Obligations, 40 Stat. 291 and Indian Monies, 40 Stat. 591. With one exception all these special statutory requirements pertain to funds held by the Government for the benefit of others. It is difficult to suppose that what Congress has commanded with respect to funds held by its agencies in an immediate fiduciary capacity, it would deem a violation of law if done with respect to funds beneficially owned by the United States itself. What may be inimical to the private aspects of the national banking system, and therefore *ultra vires,* has no such relevance to the public aspect of national banks and to the enforcement of the public interest by those charged with primary responsibility for its guardianship."

The opinion stresses that the form in which the government acts is not material to the issue of the banks' power, and that the loss of these agencies would, for all practical purposes, be government losses.

MR. JUSTICE ROBERTS delivered a dissenting opinion in which the CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS concurred. The opinion states, in part:

> "The court below followed and applied the decisions of this Court in *Texas & Pacific Railway v. Pottorff,* 291 U. S. 245, *Marion v. Sneeden,* 291 U. S. 262, and *Lewis v. Fidelity & Deposit Co.,* 292 U. S. 559.
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> "It is true that those cases presented the question whether national banks are authorized to give security for private deposits and those of state agencies. But the basis of each of the decisions was that national banks are without power to pledge assets as security for *any* deposits, in the absence of express legislative sanction. Paradoxically, the opinion of the court, while recognizing the authority, in the field of banking, of Mr. Justice Brandeis, who announced the opinions in all three cases for a unanimous court, rejects the fundamental principle of the opinions. Whereas in the *Lewis* case Mr. Justice Brandeis announced in plain terms that, in the absence of express authorization, a national bank has 'no power to make any pledge to secure deposits except the federal deposits specifically provided for by the Acts of Congress,' the opinion of the court spells out such power despite 'the silence of the act.'"

Woodring v. Wardell, No. 5, involved the same question as to moneys deposited by the Secretary of War in the District National Bank of Washington, D. C., on behalf of the Canal Zone. The District Court ruled that the pledges were *ultra vires* and allowed the insolvent bank's receiver to recover an amount in excess of dividends paid to ordinary depositors. The Court of Appeals affirmed. This was reversed by the Supreme Court in an opinion by MR. JUSTICE FRANKFURTER for the reasons stated in the *Inland Waterways Corporation* case, reviewed above.

MR. JUSTICE REED and MR. JUSTICE MURPHY took no part in these cases.

The cases were argued by Mr. Assistant Attorney General Shea for the petitioners in both cases, by Mr. Swager Sherley and Mr. George G. Springston for the respondent in No. 6, and by Mr. Brice Clagett and Mr. George P. Barse for the respondent in No. 5.

Courts—Jurisdiction to Adjudicate Cross-Claims Against the United States

In cases where the United States files a claim in a federal district court in bankruptcy proceedings or in a state probate court in probate proceedings those courts have no jurisdiction to adjudicate a cross-claim against the government in excess of the amount of the government's original claim, in the absence of congressional legislation consenting to the exercise of jurisdiction.

The government's immunity from suits extends to claims asserted against it by way of cross-claim as well as to those instituted as original suits against the government.

United States v. United States Fidelity and Guaranty Co., 84 Adv. 619; 60 Sup. Ct. Rep. 653 (No. 569, decided March 25, 1940).

In this case the opinion of the Court, delivered by MR. JUSTICE REED, describes the questions involved as follows:

> "(1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted

former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit?"

The United States, acting for the Choctaw and Chickasaw Nations, leased coal lands to a company with the respondent Guaranty Company as surety on a bond guaranteeing the payment of royalties under certain leases. The leases became the property of Central Coal & Coke Company, as assignee, the Guaranty Company continuing as surety. This assignee went into receivership in a federal court in Missouri and the United States filed therein a claim on behalf of the Indians for royalties under the leases. The assignee resisted the claim and asserted credits against the Indians for $11,060.90. The receivership was transmuted into a reorganization under Sec. 77B of the Bankruptcy Act and in the reorganization proceedings the claim of the Indians was allowed for $2,000 and the Debtor's cross-claim was allowed for $11,060.90, and a decree entered for the balance of $9,060.90. No review of this allowance was ever sought.

Meanwhile, the United States had brought suit against the Guaranty Company as surety on the bond in a federal court in Oklahoma. After the judgment of the Missouri federal court, the Guaranty Company pleaded that judgment as a bar to the recovery by the United States. The Trustee of Central Coal & Coke Company and Central Coal & Coke Corporation, which had taken over certain assets of the insolvent, were allowed to intervene upon the allegation that they each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as a defense and pleaded also the merits of the counter claims; asked for a decree that the Missouri judgment was valid; and demanded an accounting between themselves and the Indian Nations on their counter-claims. The District Court allowed judgment against the Indians and the Circuit Court of Appeals affirmed. On certiorari, the judgment was reversed by the Supreme Court.

MR. JUSTICE REED observes first that the government concedes so much of the Missouri judgment as satisfies the Indian claim against the lessee, such concession being upon the theory that a defendant may, without statutory authority, recoup on a counter-claim the amount of the principal claim.

As to the balance of the claim, however, the view is taken that the rules as to consent to suit by a sovereign apply to cross claims as well as to direct suits. In exposition of this view, MR. JUSTICE REED says:

> "We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States v. Shaw* we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Chocktaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do. No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States. The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to 'any United States Court in the Indian Territory.' Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems."

The opinion observes further that the immunity to suit may not be waived by officers of the government, and also that failure to seek review of the Missouri judgment cannot bind the United States under the principle of res judicata.

As to the second question presented for decision, the Government argued that the cross claim cannot be litigated in the present suit for the reason that the statute limits the right to set up a cross-claim to "party defendants" and the Coal Company and the Trustee as interveners are not party defandants under the jurisdictional act of 1906. The opinion of the Court concludes that the Trustee of the Coal Company was actually a defendant since the government did not object to the order filing the intervening petition. From the state of the record the Court declines to pass on the question whether the Coal Corporation, the successor to the insolvent, has any cross-claim against the Indian Nations.

United States v. Shaw, No. 570, presented a similar question. There the Michigan Supreme Court had allowed a set-off against a claim based on a judgment filed by the United States in a probate court against the administrator of an estate. It adjudged that the United States was indebted to the estate for $23,628.97, the difference between the lumber company's claim and the government's claim. The judgment arose out of a suit brought by the government for breach of contract which the Emergency Fleet Corporation had made with the decedent. The administrator asserted a set-off based on a judgment which the lumber company had obtained against the decedent for breach of a contract. The government had assumed the decedent's commitments under that contract. The lumber company's claim exceeded the government's claim in amount.

In an opinion by MR. JUSTICE REED, the Supreme Court reversed the judgment and ruled that the set-off was not allowable, in view of the immunity which the United States has from suits, and since Congress has not modified the rule of immunity to allow a cross-claim in excess of the government's claim.

The Court takes the view that the Michigan court was without jurisdiction to adjudicate a claim against the United States. Describing the basis for the government's immunity from suit MR. JUSTICE REED says:

> "The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity

and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of March 3, 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues. Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act. Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed."

The Court rejects the contention that the immunity extends only to cases originally brought against the government as distinguished from cross-claims and finds inapplicable an analogy to cross-claims in collision cases in admiralty where the United States libels a vessel. There, as the opinion points out, it is necessary to determine the cross-claim in order to reach a conclusion as to the liability for the collision.

MR. JUSTICE MCREYNOLDS took no part in these cases.

The cases were argued by Mr. Solicitor General Biddle for the petitioner, and by Mr. Bower Broaddus and Mr. Julian B. Fite for the respondent in No. 569, and by Mr. Solicitor General Biddle for the petitioner, and by Mr. Eugene F. Black and Mr. Shirley Stewart for the respondent in No. 570.

Taxation—Oklahoma Income Tax Law—Validity of Tax on National Banks

Section 16 of the Oklahoma Income Tax Law of 1935, imposing a tax of 6% on the net income of every national banking corporation within the State, is valid under R.S. 5219 and is not in violation of the United States Constitution, although in the computation of the tax income from tax-exempt federal securities is included in arriving at gross income.

Tradesmens Nat'l Bank of Oklahoma City v. Oklahoma Tax Commission, 84 Adv. Op. 588; 60 Sup. Ct. Rep. 688 (No. 596, decided Mar. 25, 1940).

On this appeal challenge was made to the validity of the tax laid by § 16 of the Oklahoma Income Tax Law of 1935 upon every national banking corporation in the State "according to, or measured by, its net income" at the rate of 6%. State banks and Morris Plan companies are similarly taxed. Net income is computed by subtracting from gross income certain specified deductions. In the gross income is specifically included "interest upon the obligations of the United States, or its possessions, or upon securities issued under the authority of an Act of Congress, the income from which is tax free."

All other types of corporations are taxed at a flat rate of 6% on net income allocable to business transacted in the State, but net income for this purpose is determined by making certain deductions from gross income, which is so defined as to exclude interest on tax exempt federal securities.

In determining the appellant's tax for 1936 under the Act, the Oklahoma Tax Commission included in gross income stock dividends from a Federal Reserve Bank and interest on bonds and notes issued under acts of Congress declaring the income from such securities to be tax exempt. The present appeal arose from a suit brought by the taxpayer to recover such portion of the tax, paid under protest, as resulted from including the dividends from the Federal Reserve Bank stock and interest from the bonds and notes.

The appellant contended that the tax violates the federal statute R. S. 5219 and is in violation of the United States Constitution. The Oklahoma Supreme Court sustained the tax and on appeal its ruling was upheld by the Supreme Court in an opinion by MR. JUSTICE MURPHY.

The Court holds that the challenged tax is consistent with a method of permissible taxation prescribed by R. S. 5219. Referring to method numbered (4) therein prescribed and pointing out that the Oklahoma Act expressly adopted that method, MR. JUSTICE MURPHY says:

"Method numbered (4) provides for a tax on such associations 'according to, or measured by' 'the entire net income received from all sources' subject only to certain restrictions as to the rate. This method was added to the three previously authorized under R. S. 5219 by an amendment of March 25, 1926 [c. 88, 44 Stat. 223]. The plain meaning of the amendment is confirmed by its legislative history showing beyond doubt that Congress intended to authorize a franchise tax measured by net income including interest on tax-immune federal securities.

"Oklahoma in the 1935 act expressly followed and adopted the method thus authorized in the amendment. . . . Subsection (b) of §16 expressly declares that the state thereby adopts method numbered (4) authorized by R. S. 5219, 12 U. S. C. §548.

"The power of Congress to authorize a state to impose a tax on the franchise of a national banking association can not now be doubted. . . . Any immunity attaching to the franchise by virtue of R. S. 5219 as it read prior to the 1926 amendment. . . . could be withdrawn by Congress and the franchise subjected to state taxing power, just as national bank shares were so subjected by the Act of June 3, 1864. . . .

"The power of a state to levy a tax on a legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities or their income, is likewise well settled. . . . Thus state laws taxing the shareholders of national banks in accordance with R. S. 5219 on the full net value of their shares, although the banks owned tax-exempt federal securities, have been consistently upheld. . . . The rule that a tax upon a legitimate subject, measured by net income, including that from tax-immune federal instrumentalities, is not an infringement of the immunity, was affirmed in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 165, and followed in *Educational Films Corp. v. Ward*, 282 U. S. 379. . . . The tax-immunity conferred on the securities owned by appellant has not been shown to be any greater in extent than that conferred on the federal securities included in the measure of the taxes sustained in the cited cases.

"Sections 16 and 17 of the 1933 act were for present purposes identical with the corresponding sections of the 1935 act, but §18 of the prior act contained a provision expressly excluding from gross income the interest on tax-immune federal securities."

The appellant contended further that the tax is an unconstitutional levy on the tax-immune income itself under the decision of the Supreme Court in *Macallen v. Massachusetts*, 279 U. S. 620. The Court rejects this contention, observing that under the circumstances of the case it does not fall within the ruling of the *Macallen* case, if that decision still has vitality.

The contention was also made that the tax violates the restriction in R. S. 5219 that "the rate shall not

be higher than . . . the highest of the rates . . . assessed upon mercantile, manufacturing, and business corporations doing business" within the State. A survey of the whole tax structure of the State led to the conclusion that in its practical operation the scheme of taxation adopted by the State does not discriminate against national banking institutions.

MR. JUSTICE MCREYNOLDS did not participate in the case.

The case was argued by Mr. E. W. Walker for the petitioner, and for the respondent by Mr. F. M. Dudley.

Taxation—Estate Taxes—Application to Property Subject to Power of Appointment by Will

The statute of New York (New York Laws of 1932, ch. 320) subjecting to its estate tax, as part of the estate of the donee of a power of appointment, property over which the donee has a limited power, and which thereby subjects to the tax property not otherwise taxable in the estate of either the donor or donee of the power is valid under the Fourteenth Amendment of the United States Constitution.

Whitney v. State Tax Commission of New York, 84 Adv. Op. 584; 60 Sup. Ct. Rep. 635 (No. 541, decided March 25, 1940).

This case involves questions as to the constitutional validity of an estate tax imposed by the State of New York on the estate of the widow of Cornelius Vanderbilt. The validity of the tax was challenged on the ground that it violated provisions of the Fourteenth amendment of the Federal Constitution. The particular issue here involved depends on the construction and validity of Ch. 320 of New York Laws of 1932.

Mr. Vanderbilt died in 1899 leaving a will whereby he created a trust fund to pay an annual income to his wife. The widow was given power to dispose of the trust fund among their four children in such proportions as she might elect; and in default of appointment the fund was to go to the children equally. Mrs. Vanderbilt died in 1934, leaving a will in which she exercised the power.

In computing the estate tax the taxing authorities included the value of the trust fund in the widow's gross estate. The Court of Appeals of New York sustained the tax.

The effect of this decision was to reduce the amount available for distribution among the beneficiaries of the widow's independent property below what would have been available had the tax been assessed on her property exclusive of the trust fund subject to the power of appointment.

On appeal the ruling of the Court of Appeals was sustained by the Supreme Court in an opinion by MR. JUSTICE FRANKFURTER. The opinion traces the history of the New York system of death taxes from its inception in 1885.

This history, in relation to the purpose and effect of the Act of 1932, is set forth in the opinion, as follows:

> "The contested statute, New York Laws of 1932, Ch. 320, derives meaning as an incident in the history of New York's present system of death taxes. That system had its beginning in 1885. The original act taxed individual economic benefits derived upon death rather than the total amount of the estate. Laws of 1885, ch. 483. Under this legislation, the transmission of property subject to powers of appointment, either general or special, was attributed to the estate of the donor. *Matter of Stewart*, 131 N. Y. 274; and the subsequent exercise of the power was not taxed. *Matter of Harbeck*, 161 N. Y. 211. The administrative awkwardness incident to this treatment of appointive property led to an amendment whereby all property passing under powers of appointment was attributed to the donee, not to the donor. Laws of 1897, ch. 284. This was the New York law when Cornelius Vanderbilt died. In 1930, experience with the legacy tax in New York and elsewhere led to a shift in the basis for imposing death duties. Acting upon the results of an inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs, New York in 1930 supplanted her system which taxed the individual legatee's privilege of succession by one which measured the levy by the size of the total estate. Laws of 1930, ch. 710. Under this legislation, property subject to a power of appointment—whether general or special—is included in the donor's gross estate. If the power is general, its later exercise sweeps the appointive property into the donee's gross estate also.
>
> "As is apt to happen in extensive legislative readjustments dealing with complex problems, the effect of the change in 1930 upon some of the more specialized situations coming within the general policy was overlooked. Powers created between 1885 and 1897 had been taxable at the donor's death. Special powers created after 1897 and exercised before 1930 had been taxed at the donee's death. Powers created and exercised after 1930 were included in the donor's estate. But powers created after 1897 and not exercised before 1930 were outside the legislative framework. Thus an unintended immunity from the incidence of taxation had been given to special powers of appointment created after 1897 but not exercised before the passage of the 1930 legislation. When experience disclosed this omission, the Legislature removed it in 1932. The amendment of that year . . . included in the donee's gross estate appointive property which was not taxable at the donor's death but would have been taxable under the superseded statutory provision of 1897. It is under this amendment that New York has imposed the tax here assailed."

In disposing of the appellant's contentions the first to be considered was one to the effect that the widow was not the "beneficial owner" of the appointive property. The Court recognizes that in the conventional use of the term Mrs. Vanderbilt had no "beneficial interest" in the appointive property, that she could not use it herself, or appoint it to her estate or subject it to the claims of her creditors. But this feature is found not to be controlling. The important aspect is said to be the exercise of the power itself. In exposition of this view MR. JUSTICE FRANKFURTER says:

> "Large concepts like 'property' and 'ownership' call for close analysis, especially when tax legislation is under scrutiny. Mrs. Vanderbilt, to be sure, had, in the conventional use of that term, no 'beneficial interest' in the property which she transferred through the exercise of her power of appointment. She could not, that is to say, use the corpus of the trust herself or appoint it to her estate; nor could she have applied it to her creditors. These qualifications upon Mrs. Vanderbilt's power over the appointive property had a significance during her lifetime which death transmuted. For when the end comes, the power that property gives, no matter how absolutely it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the propety—the 'beneficial interest'—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community

of a portion of the total current of wealth released by death.

"In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall. . . .

"The circumstances of the present case illustrate the practical considerations which may induce a legislature to treat restricted and unrestricted property as a taxing unit. The potential interests of the beneficiaries of Mrs. Vanderbilt's free property are intertwined with their interests in the appointive property. The dispositions which she was free to make under her power of appointment served to enhance her freedom with respect to her own property. How Mrs. Vanderbilt would have distributed her individual property if she had possessed no control over that left by her husband is speculative. But it is certainly within the area of legislative judgment to assume that special powers of appointment are ordinarily designed for ends similar to those in the present case—namely, to enlarge the donee's range of bounty, however narrowly restricted the enlargement may be, to a circle of beneficiaries closely related to, if not identical with, those whom the donee would be naturally disposed to favor. To the extent that this is true, there is compensation for those who may succeed to the donee's individual property, and who must pay a larger tax, because the appointive property is included in the gross estate. The legislature can hardly particularize the instances and draw up a tariff of compensations, and it is certainly not the province of courts to make the attempt. It suffices that the legislature has seen fit to frame a general enactment drawn on lines not offensive to experience and aimed at curing a revealed inequality in the state's taxing system."

The opinion considers briefly and rejects the appellant's argument that the Act of 1932 violates the Equal Protection Clause.

MR. JUSTICE ROBERTS thought that the judgment should be reversed on the authority of *Binney v. Long*, 299 U. S. 280.

MR. JUSTICE MCREYNOLDS took no part in the case.

The case was argued by Mr. Arthur A. Ballantine for the appellants, and by Mr. Mortimer M. Kassell for the Tax Commission.

Summaries

Taxation—New York City Sales Tax—Validity as Applied to Oil Imported Under Bond

McGoldrick v. Gulf Oil Corp., 84 Adv. Op. 597; 60 Sup. Ct. Rep. 664 (No. 473, decided March 25, 1940).

Certiorari was allowed to determine the validity of the New York City 2% sales tax as applied to crude petroleum imported from a foreign country into New York City under bond and there sold and delivered as ships' stores to vessels engaged in foreign commerce.

The New York Court of Appeals by an amended remittitur declared that the tax as applied violated the commerce clause of the Federal Constitution, Article I, § 8, Clause 3 and also Article I, § 10, Clause 2. On certiorari the Supreme Court, in an opinion by MR. JUSTICE STONE, affirmed the judgment upon the ground that the tax in the circumstances must fail as an infringement of congressional regulation of interstate commerce. It was found unnecessary to consider the other objections to the tax.

This conclusion is reached upon an analysis of the terms of the Revenue Act of 1932 and the related provisions of the Tariff Act of 1930 and applicable Treasury regulations. These are found to afford a comprehensive scheme for the regulation of crude petroleum during manufacture under bond into fuel oil and of its delivery as ships' stores to vessels in foreign commerce. It is pointed out that the obvious purpose of the exemption as to crude petroleum, when it or its product is to be used as ships' stores, is to encourage importation of crude oil for that purpose and to enable American refineries to meet competition and recover trade which had been lost by the imposition of taxes. The Court concludes that the challenged tax conflicts with the congressional policy and must fail as an infringement of the federal regulation of commerce.

MR. JUSTICE MCREYNOLDS took no part in this case.

In *McGoldrick v. Compagnie Generale Transatlantique*, 84 Adv. Op. 602; 60 Sup. Ct. Rep. 670 (No. 44, decided Mar. 25, 1940) the validity of the New York City sales tax was again challenged as applied.

In this case, however, the New York Court of Appeals had pronounced the tax unconstitutional solely by reason of its effect on interstate commerce. The state court had not passed upon the validity of the tax as applied to bonded fuel oil imported under bond and without payment of duty and released for export or for use as fuel by a vessel, or as to whether the oil came within the class known as "draw-back" oil where an import duty is paid which is later refunded upon the export of the refined product.

The Supreme Court in an opinion by MR. JUSTICE STONE reversed the judgment. Insofar as the validity of the tax under the commerce clause is concerned, the Court finds that the recent decision in the *Berwind-White Coal Mining Company* case is controlling.

Attention is also given to the question whether, in the state of the record, the ruling of the New York Court of Appeals should be sustained on any other ground. In this connection it is observed that the respondent in its petition for certiorari relied not only upon the commerce clause but upon Article I, § 10, Clause 2, prohibiting "imposts or duties on imports or exports." But no mention was made of any applicable federal statute. Moreover, the respondent conceded that the contentions advanced by it in the Supreme Court were not argued in the New York Court of Appeals. On this state of the record the Supreme Court concluded that it should not decide a question not presented to or decided by the highest court of the state whose judicial action is under review.

The opinion emphasizes that on the remand the state courts will be free to decide any federal question remaining undecided in the Supreme Court which, in conformity with state procedure, may arise for consideration there and that the remand will be without prejudice to the further presentation of any federal question to the Supreme Court.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concurred in the view that the questions relating to foreign commerce were not before the Court, but they were of the opinion that the judgment of the state court invalidating the tax as a violation of the commerce clause should be affirmed upon the grounds stated in the dissenting opinion in No. 475, *McGoldrick v. Berwind-White Coal Mining Company*.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE MURPHY took no part in this case.

The cases were argued by Mr. Paxton Blair for the petitioner, and by Mr. Matthew S. Gibson for the respondent in No. 473; and by Mr. William C. Chanler for the petitioner and by Mr. Harold S. Deming for the respondent in No. 44.

Federal District Court Procedure—References to Masters

McCullough v. Cosgrove. ——Adv. Op.——, —— Sup. Ct. Rep.——. [No. 14, Original, decided April 1, 1940.]

This was a motion to file a petition for mandamus to direct a District Judge of the Southern District of California to vacate his order in certain cases referring them to a master for trial.

The Supreme Court in a *per curiam* opinion granted the motion for leave to file the petition, and stated that the return to the order to show cause would be treated as an answer to the petition. It then ordered that the order of reference be vacated by the district judge, and trial of the cases in which the reference had been made be had by the district court in due course without postponement to that of other cases not entitled to preference, but with such arrangements as to the particular judge who should conduct the trial as would be consistent with the court's convenience. The opinion cites Rule 53(b) of the Rules of Civil Procedure as authority.

Federal Income Taxation—Finality of Findings of Board of Tax Appeals

Helvering v. Kehoe. ——Adv. Op——, ——Sup. Ct. Rep.——. [No. 419, decided February 26, 1940.]

Certiorari was granted here to review a judgment of the circuit court of appeals, which had ruled that a holding of the Board of Tax Appeals which sustained the action of the Commissioner in setting aside a closing agreement entered into under § 1106(b) of the Revenue Act of 1926 for fraud or malfeasance or misrepresentation of fact, was not supported by adequate evidence.

The Court's opinion by MR. JUSTICE MCREYNOLDS refers to the discussion of the facts in the majority and dissenting opinion of the Circuit Court, and points out that upon review of the Decisions of the Board, the court may not substitute its judgment of the facts for that of the board. It concludes that since the finding of fraud in this case was supported by substantial evidence, the court erred in failing to accept them.

The case was argued on February 7th and 8th, 1940, by Mr. John Phillip Wenchel for the petitioner and by Mr. Robert T. McCracken for respondent.

Modification of Supreme Court Decree in Illinois Sanitary District Case—Appointment of Special Master

Wisconsin v. Illinois. ——Adv. Op.——, ——Sup. Ct. Rep.——. [Nos. 2, 3, and 4, Original, decided April 3, 1940.]

This was a petition by the state of Illinois to modify the decree of the Supreme Court enjoining the defendants from diverting after December 31, 1938, any waters of the Great Lakes-St. Lawrence system through the Chicago drainage canal or otherwise in excess of an annual average of 1500 cubic feet per second in addition to domestic pumpage.

The modification sought was to permit an increase in the diversion to not more than 5000 cubic feet per second, in addition to domestic pumpage, until December 31, 1942.

The petition was submitted on behalf of certain communities bordering the Illinois waterways on the ground that the comprehensive system of sewage treatment which it was contemplated when the original decree was entered would be completed by 1938, had not yet been finished and would not be completed until 1942, and that as a consequence, conditions dangerous to public health now existed along the sanitary district and Illinois waterways.

The Court's *per curiam* opinion points out that the state has failed to show that it has used all possible means to complete the system as required by the decree, and has presented no excuse for the delay or shown any proof that the conditions complained of menace the public health or that suitable measures to correct those conditions in other ways than by increasing the water diversion from Lake Michigan can not be provided. The opinion then concludes that in order to satisfy itself as to the actual condition, the Court will appoint a special master to make summary inquiry and to report to the Court with all convenient speed.

By order of April 3, 1940, the Court appointed Mr. Monte M. Lemann as the Special Master to which the opinion refers.

Argued on March 25th and 26th, 1940, by Mr. John E. Cassidy and Mr. Montgomery S. Winning for defendant state of Illinois, and by Mr. Herbert H. Naujoks, Mr. Thomas J. Herbert and Mr. Timothy F. Cohan for the respective complainant states.

Territories—Power of Territorial Courts and Legislatures—Puerto Rican Organic Act Construed

Puerto Rico v. Hermanos. — Adv. Op. —, Sup. Ct. Rep. —. [No. 582, decided March 25, 1940.]

Certiorari was granted here to determine whether the Supreme Court of Puerto Rico, acting in accordance with a statute of the Puerto Rican legislature, may validly entertain a proceeding in *quo warranto* authorized by the local statute to enforce the provisions of § 39 of the Organic Act of Puerto Rico (U. S. C., Title 48, § 752) by which the Federal Congress had restricted the amount of land that may be owned in Puerto Rico by corporations to a maximum of five hundred acres.

The Court's opinion, by Mr. JUSTICE FRANKFURTER, examines the contention that since Congress had fixed no direct consequences to disobedience of the land policy, the Puerto Rico legislature has no power to graft such consequences upon the Congressional prohibition and concludes that under § 37 of the Organic Act (U. S. C., Title 48 § 821) which extends the local legislative power to "all matters of a legislative character not locally inapplicable," the *quo warranto* procedure was within the authority of the legislature to provide by statute, and was a valid exercise of discretion vested in it by Congress which is confined only by the frame-work which Congress sets up.

The opinion also concludes that the objection to the Puerto Rico Supreme Court jurisdiction based on § 256 of the Judicial Code which vests in "the courts of the United States . . . exclusive of the courts of the several states" jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States," is not well founded, since § 37 of the Organic Act of Puerto Rico is not a "law of the United States," of general application, but is concerned with local policy calling for local enforement by local courts.

MR. JUSTICE MCREYNOLDS did not participate.

The case was argued on March 7th and 8th, 1940, by Mr. George M. Wolfson and Mr. Henri Brown for respondent and by Mr. William Cattron Rigby for peti-

(*Continued on page* 446)

Status of Logan-Walter Bill

THE liberal education contained in the House of Representatives' consideration of this bill, H. R. 6324, to provide for the more expeditious settlement of disputes with the United States, really showed Congress at its best. The speeches indicated the considerable amount of preparation, sound deliberation, and progressive thought which had been given to the subject by the members. The House did not pass the bill until after a number of sharp contests as to which agencies of the government should be excepted from the scope of the measure and which should remain within it.

Explanation was made by Clarence E. Hancock, of New York, that several years ago regulations with the force and effect of law were issued, revised, rescinded, and reissued with bewildering rapidity and without notice to the citizens affected thereby; but that "This confused state of affairs was corrected by the passage of a law requiring that governmental regulations and orders be filed with the United States Archivist and published in the Federal Register before they became effective. This bill will make a longer and more important step toward orderly government by compelling the numerous Government agencies to adopt rules and apply them in accordance with the law of the land."

The same member said also that "This bill is not a hasty or ill-considered piece of legislation. It is the product of the best legal minds in the American Bar Association and other leading bar associations throughout the Nation, as well as of able members of the Judiciary Committees of the Senate and the House, after years of study. It has their strong support, and the support of important business, labor, and farm organizations throughout the country."

Representative John E. Rankin, of Mississippi, objected especially to the bill's application to the Rural Electrification Administration and the Federal Power Commission and said: ". . . this bill would paralyze the S. E. C. and permit to continue this gigantic octopus known as the Power Trust—these utilities holding companies that are today robbing the people of Georgia in overcharges for electric lights and power amounting to $11,000,000 a year." E. E. Cox, of Georgia, said: ". . . my friend the gentleman from Mississippi has made a great contribution to the setting up of regulatory measures which have operated upon the power trusts of this country, and for that I applaud him. But he misses the whole point of this bill." Representative Cox closed his statement with an excellent quotation from a Supreme Court opinion rendered in April, 1936, the keynote of which was that "Arbitrary power and the rule of the Constitution cannot both exist" (*Jones v. Securities and Exchange Commission*, 298 U. S. 1, 24; 56 S. Ct. 654, 661; 80 L. ed. 1025).

Charles Hawks, Jr., of Wisconsin, mentioned a lawyer friend of his who recently had been piloting a client through "unavoidable mazes of routine" which he called "rigmarole;" and Mr. Hawks then made the very quotable but hardly pronounceable remark that "It is in the atmosphere of 'rigmarole' that bureaucracy proliferates."

Dave E. Satterfield, Jr., of Virginia, quoted President Buchanan, when he was a member of the House and Chairman of the Judiciary Committee, as having said that "Next to the importance of doing justice is the belief that justice is being done."

Later in his remarks, Mr. Satterfield said that ". . . the most dangerous and ultimately disastrous idea that can lodge within the human mind is that the end justifies the means." He wondered whether James Madison might not have "envisioned the developments of our day when he said": "In framing a government, designed for the rule of men over men, the great difficulty lies in this: You must first enable the government to control the governed and then oblige it to control itself."

Supreme Court Summaries

(*Continued from page* 445)

tioner, and by Mr. Melvin H. Siegel for the United States as amicus curiae.

Federal Communications Act—Radio Broadcasting Licenses—Necessity for Consideration of Economic Factors in Granting Licenses — Who May Appeal

Federal Communications Commission v. Sanders Brothers Radio Station. — Adv. Op. —, — Sup. Ct. Rep. —. [No. 499, decided March 25th, 1940.]

Certiorari to determine whether an order of the Communications Commission granting an application for a license to erect a radio broadcasting station is defective because the Commission did not make findings as to economic injury to a rival station in the same area, due to competitive conditions in that area, who had intervened before the Commission to oppose the application; and whether, assuming that findings on this subject are not essential, the intervening rival station is authorized by § 402(b) of the act to appeal to the Court of Appeals of the District of Columbia as "a person aggrieved, or whose interests were adversely affected, by any decision of the Commission granting or refusing any such application."

The Court's opinion, by Mr. JUSTICE ROBERTS, holds that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license, although the question of competition between a proposed station and one operating on an existing license may have an important bearing upon the ability of the applicant to serve his own public. It also concludes that although a licensee cannot resist the grant of a license on the sole ground that the resulting competition may injure him economically, yet he is entitled to appeal under § 402(b) of the Act; since, although the injury would not be subject to redress, the person injured might by appealing be the only instrument of redressing an injury to the public service which would otherwise be without a remedy, and that Congress intended and had power to confer standing to prosecute on appeal in such a situation.

Mr. JUSTICE MCREYNOLDS did not participate.

The case was argued on February 9, 1940, by Mr. William J. Dempsey for petitioner and by Mr. Louis G. Caldwell for respondent.

CURRENT EVENTS

University of Michigan Announces 1940 Law Institute

FOLLOWING its very successful Law Institute of last year, when more than one hundred and seventy-five lawyers from all parts of the United States gathered on its campus to spend three days in earnest study of certain recent developments in the law, the University of Michigan Law School has decided to make the Institute an annual event.

The work of the 1940 Institute will cover three days, June 20, 21, 22. Those attending will be housed in the Law School dormitories, which will be otherwise vacant at that time. Men who wish to bring their wives will find accommodations at the Michigan Union and the Michigan League. The sessions of the Institute will be held in the Law School classrooms, with desks available for taking notes, and a lawyer may, for these three days, re-live his student life.

Three Fields of Law Will Be Covered

The work of the Institute, as last year, will be planned to discuss developments in three quite widely separated fields of law. This year's topics are Restitution, Procedure, and Recent Federal Legislation of Importance to the Practitioner. The faculty will be made of both Law School professors and practicing lawyers. (1) The subject of Restitution, which is having the most rapid growth of all branches of equity jurisprudence, will be discussed by Professor John P. Dawson of the University of Michigan law faculty. (2) Three different topics will be taken up under the general heading of Procedure: "Discovery Before Trial," "Some Problems in the Introduction of Documentary Evidence," and "Discovery of Assets after Judgment." The lecturers will be Professors Edson R. Sunderland and John E. Tracy of the Law Faculty, and an experienced practicing attorney whose name will be announced later. (3) The subject of Recent Federal Legislation will be covered by Frank E. Cooper of the Detroit Bar, who will talk on the Fair Labor Standards Act, by Roy H. Callahan of the New York Bar, who will talk on the Robinson-Patman Act and by Professor Laylin K. James of the Law Faculty who will discuss Recent Federal Statutes Affecting the Law of Corporations. Mimeographed outlines will be furnished in advance to those who register, and the last part of each two-hour session will be spent in considering questions from the floor.

All Lawyers Invited

The sessions will be held in the morning and early afternoon, leaving the remainder of the day free for golf, relaxation, and informal visiting and discussion. All lawyers are welcome. The attendance is in no way limited to Law School alumni.

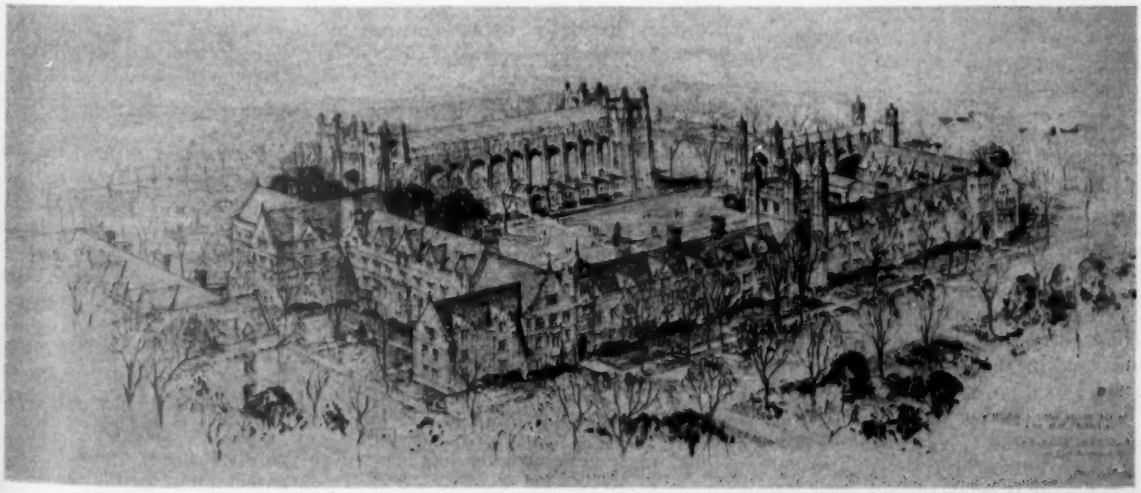
Reservations may be made, and any further information regarding the Institute may be obtained, by addressing Dean E. Blythe Stason, Hutchins Hall, Ann Arbor, Michigan.

Pre-Trial Procedure in the District of Columbia

A 246% increase in the total number of contested cases disposed of by the District Court of the United States for the District of Columbia in the period from September 18, 1939 to March 1, 1940, as compared with the comparable period a year ago, is shown in a recent report made by that Court.

As pre-trial procedure was inaugurated on September 18, 1939, principal credit for the achievement must go to it and to the efficient manner which the pre-trial docket has been presided over by Justice Bolitha J. Laws of the District Court.

One more additional justice serving in civil cases during the 1939 period over the number for the period commencing in 1938 undoubtedly accounts



York and Sawyer, Architects

Lawyers Club, University of Michigan (Artist's Sketch)

for part of the increase in the civil cases disposed of. However, the statistics seem to indicate that there can be no question but what a large part of the progress has resulted from the pre-trial procedure, partly because it has resulted in so many compromise settlements of cases.

Out of a total of 1690 cases disposed of in the period ending March 1, 1940, 772 were disposed of by praecipe without trial.

As a result, according to the Assignment Commissioner, there has been a very notable acceleration of the calendar. He reports that as of October 1, 1939, 23 months would elapse between the time a jury case was placed on the trial calendar and the date it would be reached for final trial. The period for non-jury cases was 22 months. As of February 29, 1940, this had been reduced to 17 months for jury cases and 12 months for non-jury cases.

The comparison between the 1939 and the 1938 calendars is as follows:

	Calendar for 1939	1938	Summary Gain 1939 over 1938
Contested jury cases disposed of	589	303	281
Contested non-jury cases disposed of	903	297	606
Total contested cases, jury and non-jury, disposed of	1492	605	887
Uncontested divorce (non-jury) cases disposed of	198	409	201*
Total civil cases disposed of, jury and non-jury, whether contested or uncontested	1690	1014	676

*Uncontested divorce cases are tried in non-jury Courts and usually require only a short time for trial.

Pre-trial procedure in the federal courts dates from September 16, 1938, the time the new Rules of Civil Procedure went into effect. Under the new Rules the use of pre-trial is optional for each district judge. Reports made to the Attorney General last June indicate that it is being used in some form in at least 33 district courts.

NOTICE BY BOARD OF ELECTIONS RE ELECTION OF STATE DELEGATES IN 1940

The Board of Elections met on April 13, 1940, and announced that, in accordance with Article V, Section 5, of the Constitution as amended, there had been the following nominations for the office of State Delegate to be elected in 1940 for a three-year term beginning at the adjournment of the 1940 Annual Meeting. The names indicated with an asterisk were also nominated to fill vacancies in the term which will expire at the adjournment of the 1940 Annual Meeting:

States where election is to be held	*Nominees*		*Petition Published*
Arkansas	*C. T. Cotham	Hot Springs	April
	A. W. Dobyns	Little Rock	May
Colorado	*James A. Woods	Denver	May
Delaware	*James R. Morford	Wilmington	April
Georgia	Arthur G. Powell	Atlanta	April
Idaho	Oliver O. Haga	Boise	May
Indiana	Harold H. Bredell	Indianapolis	May
Louisiana	Charles E. Dunbar, Jr.	New Orleans	May
Maryland	T. Scott Offutt	Towson	March
Minnesota	Morris B. Mitchell	Minneapolis	May
Nevada	Chas. A. Cantwell	Reno	April
New Hampshire	Conrad E. Snow	Rochester	April
	Louis E. Wyman	Manchester	April
New York	George H. Bond	Syracuse	May
	James W. Ryan	New York City	May
	William M. Winans	Brooklyn	May
Ohio	Charles W. Racine	Toledo	March
Oregon	Sidney Teiser	Portland	May
Rhode Island	*Chauncey E. Wheeler	Providence	April
Utah	Robert L. Judd	Salt Lake City	May
West Virginia	*Frank C. Haymond	Fairmont	March

The following nominations were received to fill vacancies in the office of State Delegate in which the terms expire with the adjournment of the 1941 Annual Meeting:

States where election is to be held	*Nominees*		*Petition Published*
New Mexico	H. A. Kiker	Santa Fe	May
Wisconsin	Otto A. Oestreich	Janesville	March
Territorial Group	L. Dean Lockwood	Manila, P. I.	May

Arrangements have been completed for the distribution of the ballots, in accordance with the Constitution, and these to be counted must be received by the Board of Elections at the headquarters of the American Bar Association before the close of business at 5:00 P. M. on June 7, 1940, with the exception of the ballots voted by members accredited to the Territorial Group. Ballots from members in the Territorial Group must be received before the close of business at 5:00 P. M. on July 5, 1940.

It will be observed that there is at least one nominee in each of the twenty jurisdictions in which elections are being held, and there are contests for the office of State Delegate in Arkansas, New Hampshire, and New York. However, in all jurisdictions a vote may be cast for someone other than a nominee, whose name appears on the ballot, by writing in a name in the blank space provided and placing X in the square opposite. Ballots to be used in the elections to fill vacancies are printed on yellow paper; those to be used in elections for the regular three-year term are printed on white paper.

ONLY MEMBERS WHO HAVE PAID THEIR DUES FOR THE CURRENT YEAR WILL RECEIVE BALLOTS AS THEY ARE THE ONLY ONES IN GOOD STANDING AND THEREFORE ENTITLED TO VOTE.

The nominating petitions not heretofore published appear below.

BOARD OF ELECTIONS,
EDWARD T. FAIRCHILD, Chairman.

Nominating Petitions

ARKANSAS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate A. W. Dobyns, of Little Rock, for the office of State Delegate for and from the State of Arkansas, to be elected in 1940, for the regular three-year term:

S. M. Casey, of Batesville;

Burk Mann, of Forrest City;

John P. Woods, Harry P. Daily, J. S. Daily, Jos M. Hill, Henry L. Fitzhugh, and John Brizzolara, of Fort Smith;

U. M. Rose, W. G. Riddick, J. Merrick Moore, Chas. T. Coleman, G. D. Henderson, Frank E. Chowning, Richard C. Butler, Shields M. Goodwin, Edward B. Downie, Thomas E. Downie, Blake Downie, H. M. Armistead, W. H. Rector, J. A. Tellier, J. Mitchell Cockrill, J. H. Carmichael, H. T. Harrison, and Edward L. Wright, of Little Rock;

Nicholas J. Gantt, Jr., W. F. Coleman, and M. Denaher, of Pine Bluff.

COLORADO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James A. Woods, of Denver, for the office of State Delegate for and from the State of Colorado for the vacancy now existing:

Charles A. Baer, Hubert Day Henry, Harry S. Silverstein, Jr., Robert E. More, Peter H. Holme, Tyson Dines, Donald S. McCreery, Paul W. Lee, F. W. Sanborn, Jr., Mason A. Lewis, G. Dexter Blount, Robert G. Bosworth, Clyde C. Dawson, Jr., Samuel M. January, Harold D. Roberts, Edgar McComb, W. Clayton Carpenter, Edward G. Knowles, Horace N. Hawkins, Frederic W. Harding, Kenaz Huffman, Robert D. Charlton, J. E. Robinson, and Philip S. Van Cise, of Denver;

Mortimer Stone, Herbert A. Alpert, and Fred W. Stover, of Fort Collins;

William R. Kelly, Hubert D. Waldo, Jr., John W. Henderson, M. E. H. Smith, Clay R. Apple, John W. O'Hagan, and Barnard Houtchens, of Greeley.

The same persons named herein, and Wm. E. Hutton, David Rosner, and B. B. McCay, of Denver, also nominate James A. Woods for the office of State Delegate for and from the State of Colorado, for the regular three-year term to begin at the adjournment of the 1940 Annual Meeting.

IDAHO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Oliver O. Haga of Boise, for the office of State Delegate for and from the State of Idaho, to be elected in 1940:

Edward J. Frawley, James W. Blaine, Laurel E. Elam, Carl A. Burke, Edwin Snow, Karl Paine, C. Stanley Skiles, E. H. Anderson, Robert Ailshie, J. L. Eberle, Chas. H. Darling, E. B. Smith, J. F. Martin, Ralph R. Breshears, W. Ddwain Vincent, M. Oliver Koelsch, James H. Hawley, Oscar Worthwine, Jess Hawley, Sam Griffin, Frank E. Chalfant, Charles C. Cavanah, Harry S. Kessler, W. H. Davison and Maurice H. Greene of Boise.

Ralph L. Albaugh, E. A. Owen, O. A. Johannesen, and Otto McCutcheon of Idaho Falls.

Abe Goff, and Bert Hopkins of Moscow.

Milton E. Zener and A. L. Merrill of Pocatello.

R. P. Parry, Asher B. Wilson, John W. Graham, Frank L. Stephan and Marshall Chapman of Twin Falls.

INDIANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Harold H. Bredell, of Indianapolis, for the office of State Delegate for and from the State of Indiana, to be elected in 1940:

Francis M. Hughes, Merle H. Miller, Carl Wilde, Elbert R. Gilliom, Howard P. Travis, Oren Stephen Hack, Frederick E. Matson, Harry T. Ice, Burke G. Slaymaker, Arthur L. Gilliom, Robert D. McCord, Sidney S. Miller, Charles M. Wells, Grier M. Shotwell, David L. Chambers, Jr., Albert Ward, John K. Rickles, Perry E. O'Neal, Julius Birge, Sherwood Blue, Earl B. Barnes, Fred B. Johnson, James R. Chase, John G. Rauch, Harvey B. Hartsock, Paul G. Davis, and Kelso Elliott, of Indianapolis;

Eli F. Seebirt, of South Bend.

LOUISIANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Charles E. Dunbar, Jr., of New Orleans, for the office of State Delegate from Louisiana, to be elected in 1940:

Richard C. Cadwallader, of Baton Rouge;

Oliver P. Stockwell, of Lake Charles;

Henry P. Dart, Jr., Burt W. Henry, Eldon S. Lazarus, James J. Morrison, Chas. F. Fletchinger, Sumter D. Marks, Jr., Wood Brown, Harry B. Kelleher, Paul Brosman, Cuthbert S. Baldwin, R. J. Weinmann, Justin V. Wolff, Charles Rosen, Gibbons Burke, Louis L. Rosen, J. Blanc Monroe, Geo. H. Terriberry, W. W. Young, Harry J. Zeringer, Benjamin W. Yancey, Jos. M. Rault, Walter Carroll, Joseph M. Jones, Marion J. Epley, Jr., Wm. Behan Dreux, Jas. Hy. Bruns, John L. Toler, Henry H. Chaffe, Harry McCall, Victor Leovy, Joseph W. Carroll, Azzo J. Plough, Henry G. McCall, Benjamin W. Dart, John Dart, Louis C. Guidry, and Leigh Carroll, II, of New Orleans;

Pike Hall, of Shreveport.

MINNESOTA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Morris B. Mitchell, of Minneapolis, for the office of State Delegate for and from the State of Minnesota, to be elected in 1940:

W. K. Montague, James G. Nye, A. C. Gillette, Donald D. Harries, R. B. Reavill, F. C. Sullivan, and Wildey H. Mitchell, of Duluth:

James H. Hall, of Marshall;

Donald C. Rogers, Clark R. Fletcher, G. Aaron Youngquist, J. B. Faegre, F. H. Stinchfield, H. C. Mackall, R. M. Crounse, Perry R. Moore, F. M. Selander, Wilbur H. Cherry, Henry Rottschaefer, Everett Fraser, Thomas E. Sands, Jr., John C. Benson, Geo. D. McClintock, Hayner N. Larson, Raymond A. Scallen, Claud G. Krause, Paul Christopherson, Rex H. Kitts, J. J. Gleason, Leonard O. Langer, Paul J. McGough, Lee B. Byard, David Shearer, Richard T. Angell, Harold G. Cant, Kenneth Taylor, H. W. Haverstock, A. D. Lindley, J. R. Kingman, Norton M. Cross, Hugh H. Barber, John F. Finn, Jr., Harry A. Blackmun, W. F. Marquart, Kenneth M. Owen, David E. Bronson, Donald West, Malcolm B. McDonald, James E. Dorsey, Chas. F. Noonan, Leland W. Scott, Leavitt R. Barker, Chas. B. Howard, Chas. F. Keyes, F. N. Furber, Clay W. Johnson, C. A. Taney, C. R. Fowler, Simon Meshbesher, and Daniel F. Foley, of Minneapolis;

Geo. W. Morgan, Monte Appel, Cleon Headley, Guy Chase, Chas. W. Briggs, W. C. Gilbert, G. S. Macartney, R. O. Sullivan, J. C. Foote, Pierce Butler, Francis D. Butler, Edgar G. Vaughan, D. B. Rumble, E. S. Stringer, M. V. Seymour, Philip Stringer, James C. Otis, Roland J. Faricy, Montreville J. Brown, Frank C. Hodgson, Stan. D. Donnelly, Edwin B. Baer, F. G. Dorety, J. Neil Morton, Edward A. Knapp, W. H. Oppenheimer, and John A. Pearson, of St. Paul.

NEW MEXICO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate H. A. Kiker, of Santa Fe, for the office of State Delegate for and from

the State of New Mexico, to be elected in 1940 for the vacancy in the term to expire at the adjournment of the 1941 Annual Meeting:

Edwin S. French, Pearce C. Rodey, Robert W. Botts, C. M. Botts, Merritt W. Oldaker, D. A. Macpherson, Jr., Donald B. Moses, M. C. Mechem, and A. T. Hannett, of Albuquerque;

Don G. McCormick, Melvin Neal, and John R. Brand, of Hobbs;

A. T. Rogers, Jr., Waldo Spiess, and M. E. Noble, of Las Vegas;

Vincent M. Vesely, Howard B. Rich, and G. T. Hanners, of Lovington;

Herbert B. Gerhart, Howard L. Bickley, Eva Thomas, Joseph M. Montoya, Daniel K. Sadler, Arthur R. Livingston, Frank Andrews, L. C. White, John T. Watson, Donovan N. Hoover, M. W. Hamilton, A. K. Montgomery, Harry S. Bowman, and Filo M. Sedillo, of Santa Fe;

Floyd W. Beutler, of Taos.

NEW YORK

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George H. Bond, of Syracuse, for the office of State Delegate for and from the State of New York, to be elected in 1940:

Charles W. Walton, Kenneth S. Macaffer, Robert C. Poskanzer, and Joseph Rosch, of Albany;

Morey G. Bartholomew, Alger A. Williams, James C. Sweeney, A. Howard Aaron, William C. Warren, Jr., Manley Fleischman, Elmer C. Miller, Christopher Baldy, and Thomas Penney, Jr., of Buffalo;

Harry H. Flemming, of Kingston;

H. G. Morison, Carl M. Owen, Harold J. Gallagher, Theodore Kiendl, John W. Davis, William D. Mitchell, Joseph M. Proskauer, Edward C. Bailly, William FitzGibbon, Joseph M. Hartfield, William C. Breed, Charles H. Tuttle, John Kirkland Clark, William L. Ransom, Robert E. Coulson, Jacob H. Goetz, Colley E. Williams, Charles H. Strong, and Henry S. Reeder, of New York City;

Paul Folger, Arthur E. Sutherland, Arthur V. D. Chamberlain, Kenneth B. Keating, Harold H. Barnsdale, Charles S. Wilcox, T. Carl Nixon, Byron C. Johnson, Eugene Raines, Charles W. Green, George F. Bodine, William F. Strang, and H. Douglass Van Duser, of Rochester;

Arthur W. Agan, Edmund H. Lewis, H. Duane Bruce, A. H. Cowie, George W. Lee, Frank H. Hiscock, Benjamin E. Shove, Stewart F. Hancock, Horace M. Stone, Tracy H. Ferguson, and Lewis C. Ryan, of Syracuse.

NEW YORK

The undersigned hereby nominate James W. Ryan, of New York City, for the office of State Delegate for and from New York: David S. Jackson, Laurence E. Coffey, Thomas C. Burke, and Charles S. Desmond of Buffalo.

D. Roger Englar, T. Catesby Jones, Oscar R. Houston, George S. Brengle, Henry N. Longley, Leonard J. Matteson, Martin Detels, P. J. Kooiman, P. J. R. McEntegart, John M. Aherne, Henry J. Bogatko, Paul H. Lacques, Charles F. Quantrell, John W. Crandall, David Asch, Jerome S. Hess, Mitchell B. Carroll, Harold Harper, J. M. Richardson Lyeth, Phanor J. Eder, George C. Sprague, Sanford H. E. Freund, John Tilney Carpenter, E. Curtis Rouse, George deForest Lord, Theodore L. Bailey, Edward Schuster, and Harry M. Zuckert, all of New York City.

NEW YORK

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate William Miller Winans, of Brooklyn, for the office of State Delegate from the State of New York, to be elected in 1940:

William Payson Richardson, William V. Hagendorn, Donald F. Sealy, Jerome Prince, Arthur Block, Stephen Callaghan, Charles D. Cords, Abner C. Surpless, A. Ernest Harris, Albert Hutton, John C. Doyle, Richard J. Maloney, Harry W. Bell, John S. Russell, Walter Bruchhausen, Edward J. Connolly, Miles F. McDonald, Nathan Sweedler, Anthony F. Tuozzo, and Frederick W. Sparks, of Brooklyn;

Orvill C. Snyder and Martin H. Weyrauch, of Freeport;

Henry W. Nichols, William M. Patterson, Ward V. Tolbert, John L. McMaster, Edward H. Wilson, Henry Alan Johnston, and William A. Hyman, of New York City.

OREGON

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Sidney Teiser, of Portland, for the office of State Delegate for and from the State of Oregon, to be elected in 1940:

A. K. McMahan, of Albany;

Harold Banta and James T. Donald, of Baker;

Oscar Hayter, of Dallas;

David B. Evans, Lawrence T. Harris, S. M. Calkins and Wayne L. Morse, of Eugene;

Eugene E. Marsh, Elliott B. Cummins, W. T. Vinton, and George Neuner, of McMinnville;

J. W. McInturff, of Marshfield;

George M. Roberts, of Medford;

Will M. Peterson and J. R. Raley, of Pendleton;

Roscoe C. Nelson, Jr., Robert C. Hunter, Thomas J. White, Andrew Koerner, Frank C. McColloch, Paul P. Farrens, James C. Dezendorf, Abraham Asher, Robert O. Boyd, James W. Crawford, Louis P. Hewitt, and W. G. Keller, of Portland;

A. N. Orcutt, of Roseburg;

George Rossman, Percy R. Kelly, John L. Rand, I. H. VanWinkle, Willis S. Moore, Allan Grant Carson, Grace E. Smith and Custer E. Ross, of Salem;

Celia L. Gavin, of The Dalles.

Robert D. Lytle, of Vale.

UTAH

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Robert L. Judd, of Salt Lake City, for the office of State Delegate for and from the State of Utah, to be elected in 1940:

Elliott W. Evans, of Bingham Canyon;

A. Sherman Christenson, of Provo;

A. H. Nebeker, Calvin Behle, Joseph S. Jones, William J. Lowe, Geo. R. Corey, Dean F. Brayton, Geo. H. Smith, Paul B. Cannon, Ralph T. Stewart, Lynn S. Richards, Golden W. Robbins, W. D. Allen, Jesse R. S. Budge, Eugene E. Pratt, Geo. Jay Gibson, John D. Rice, A. L. Hoppaugh, Robert E. Mark, Alex D. Moffat, Franklin Riter, G. A. Marr, A. M. Cheney, and Wm. M. McCrea, of Salt Lake City.

TERRITORIAL GROUP

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate L. Dean Lockwood, of Manila, P. I., for the office of State Delegate for and from the Territorial Group, to be elected in 1940 to fill the vacancy now existing in the term to expire at the adjournment of the 1941 Annual Meeting:

Geo. R. Harvey, S. W. O'Brien, J. C. Vickers, T. A. Lynch, John R. McFie, Jr., E. A. Perkins, James M. Ross, Francisco Ortigas, Jr., A. M. Opisso, Courtney Whitney, Frank W. Brady, Jose A. Santos, Felipe Agoncillo, J. Wolfson, Benj. S. Ohnick, E. P. Revilla, Claro M. Recto, C. A. Dewitt, Manuel Camus, Robert Janda, F. A. Delgado, Golden W. Bell, Manual Lim, Vicente J. Francisco and Jose C. Abreu, of Manila.

Comments—Letters

"Woman and the Law"

To the Editor:

IT was with surprise and regret that I read Miss Brown's article in your April issue. I had read and enjoyed the article of L. T. S. in a previous issue and had failed to find that its introduction was in any manner facetious, or that the subject at hand was treated with levity, but rather enjoyed the interesting approach to the problem at hand and considered the introduction a nice understanding of human weakness—or should we say strength?

It has always seemed strange to me that women could hope to obtain the millennium of so-called equality by the passage of an abstract amendment—even were it not fraught with legal complications—in view of the prejudices and discriminations of many centuries. I appreciate that women must now excel to hold comparable positions with men, and that some few unjustified legal discriminations still remain upon the statute books in our land, but we have come a long way in a short time.

I cannot help but feel that women can still attain their goal and their right to live their fullest life as individuals—in so far as any human being can do so in our complicated society—by continuing their hard work, and by demonstrating their worth, rather than by demanding idle statements of such a goal.

May I say that in my substantial number of years practicing as a lawyer I have never experienced in the Court or at the hands of my fellow lawyers the slightest discrimination on the basis of my sex. My experience has been that the discrimination existent is that of the general public, wherein I earnestly believe woman is her own worst enemy, because she herself has been the most persistent and vicious in making felt and carrying on the traditions of the centuries.

I appreciate that Miss Brown is intelligent, learned, and from all reports extremely capable in her chosen profession, and her experience may have been entirely different than mine. On the other hand, I realize that as lawyers go, I would be deemed mediocre—neither famed nor rich, and with no prospect of ever being so. Possibly my mediocrity has dulled my perception of the problem at hand, but, thank God, it has not dulled my sense of humor.

C. F.

To the Editor:

WHILE I am always interested in, and probably read every article that appears in the Journal, I was quite amused with the article in the April edition under the heading "Woman and the Law." The author's name is not given and I do not recognize her picture. At the outset, it might be doubted if the manner of selecting the author to serve as a juror was a compliance with the statute in that respect.

I was one of defense counsel in the so-called "fixing" case to which she refers. What strikes me in the article is that, while she was "greatly disappointed" because not accepted by the district attorney to serve as a juror in that case, she indicates very fixed conclusions on page 355 on the subject of disregarding testimony of distinguished federal judges; this, notwithstanding that the testimony of character witnesses is legal evidence and is to be considered by a jury along with all of the other evidence in the case. Her comments on this character of evidence, while apparently willing to accept the testimony of convicts, would seem to indicate her disqualification to serve as an impartial juror in that case, and that the district attorney in dismissing her, through an error of judgment, favored the defendants.

I emphatically agree with the closing words of the article concerning the treatment of women jurors. To my mind, attempted flattery of women jurors is below the dignity of an attorney and a reflection on the juror's intelligence. Nevertheless, our author's experience would have been still more broadened had occasion presented for her to serve on a jury where a certain government counsel seems to delight in reciting her many years of effort to bring about the legality of women jurors. Not all of the "stage play" comes from men.

Chicago. Edward J. Hess.

OUR contributor L. T. S., telling of her experiences as a juror, in the April number of the Journal (page 355), referred to the several ways in which men lawyers showed that they were conscious of the presence of women in the jury-box. Among other things, one of the lawyers "appeared in a different suit each day with a different collar and a shirt of brilliant hue." This lawyer writes us:

> "Allow me to convey to you my opinion that the article 'Woman and the Law,' which appeared in the April, 1940, issue, was one of the most interesting and intelligent commentaries by woman jurors that I have ever read. I think that lawyers in general could profit immensely by following L. T. S.'s suggestions. I know that I have gleaned a number of valuable lessons therefrom."

The Torrens System

To the Editor:

THERE is not much to be gained by continuing the discussion on land registration started by my review in the February issue of the Journal to which my friend Mr. Richard W. Hale of the Massachusetts Bar replied in the April number.

Mr. Hale is a very eminent conveyancing lawyer but both from his article published in the National Real Estate Journal, with which I am familiar, and in his comment in the April number of the Journal it is apparent that his views are colored by and his opinion based upon his experience in Massachusetts. From what I know of the situation and what Mr. Hale says about it, it is entirely correct. Unfortunately perhaps, as the General Counsel of the National Association of Real Estate Boards, I have had to base my views upon the forty-seven other states in addition to Massachusetts, including my own experience in Illinois, which has not been inconsiderable in this field.

Consequently, even though I do not agree in the designation by Mr. Hale of what Professor Powell has written as "stuff," my views on the general question have been formulated in the light of many years' consideration of

this question in which I have not been unfriendly to the land registration system. It remains a fact however that in this vicinity as well as in many others the Bar prefers the title guarantee system to the land registration system.

Only last week a significant thing in this matter came up in our own office: namely, the question as to whether one of the federal agencies, the Federal Housing Administration, would accept an abstract and opinion as many private investors, insurance companies and the like do in connection with a large loan. They took the position that, except in rural communities where guarantee policies were not available they would insist upon a guarantee policy, and would not accept either a land registration certificate or an abstract.

This means that a lawyer who has accepted either a land registration certificate or an abstract on behalf of his client in connection with the title examined by him, is forced to put his client to the additional expense of a guarantee policy also.

This is one of the reasons why I repeat that most lawyers handling these matters would agree, I think, as I stated in my review, with the conclusions reached by Professor Powell and would prefer either an abstract and opinion which would lower the cost of the subsequent policy or a guarantee policy in the first instance.

Perhaps one reason that the land registration system has worked so successfully in Massachusetts is that, from my knowledge of the situation there, they have not developed an adequate abstract system such as is in effect in other jurisdictions.

I can not speak for Massachusetts and am perfectly willing to agree that Mr. Hale can do so, but I am confident that I do speak for the lawyers handling such transactions in this vicinity and in many others throughout the country.

NATHAN WILLIAM MACCHESNEY
Chicago.

Finding the Decisions On the Rules

With the publication of Mr. Holtzoff's book on the New Federal Rules of Civil Procedure, the JOURNAL is ending its service to its members on Decisions on the Rules. In the probationary period, when the rules were not yet well known and they lacked the benefit of judicial interpretation in actual cases throughout the country, the JOURNAL regarded it as a necessary and useful service to print the bulletins issued by the Department of Justice containing all federal decisions concerning the rules. Mr. Holtzoff's book, which is now issued, contains the text of the rules, with a reference rule by rule to all the decisions of 1938 and 39, supplementing the two volumes issued by the American Bar Association giving the proceedings of the Cleveland Institute and the Washington and New York Institutes. These three books, and private publications, will no doubt continue to be indispensable sources of information to the student of the rules.

The Attorney General has been furnishing copies of the department bulletins to the federal judges and district attorneys, and to a considerable number of law libraries throughout the country. Current decisions are also reported in the Federal Reporter and the Federal Supplement and the digests of the advance sheets and the bound volumes of the Reporter System. In addition there are at least three current publications which are very valuable and will no doubt be used extensively by lawyers who are so situated that they feel at liberty to spend the necessary money for these excellent services.

All told, the profession is now thoroughly well served in the matter of federal decisions on the New Rules of Civil Procedure, and limitations on its space compel the JOURNAL to withdraw from a field which now seems to be well supplied.

LAW LIBRARY ASSOCIATION OF GREATER NEW YORK

THE Law Library Association of Greater New York held its annual meeting at dinner on Feb. 5. Lawrence H. Schmehl, of the New York County Lawyers' Association, presided as President of the Association, and presented a resumé of the first year's work, calling attention particularly to the six regular meetings held during the year at which there was an average attendance of thirty-seven. A. Alfred DeVito, Library of the Court of General Sessions was elected President; Mrs. Helen Smith Helmle, Library of the Equitable Life Assurance Society, Vice-President; and Miss Irene J. Catterson, Library of U. S. Circuit Court of Appeals, Secretary and Treasurer.

The new President spoke on a number of important subjects: the unfortunate duplication in law reporting and in the publication of law books; the need of action by the Association to improve the professional standing of law librarians, particularly when the question arises as to appointments to fill vacancies; and to make the influence of the profession of importance in deciding public questions of interest to law libraries and librarians.

On motion duly adopted the President appointed a Legislative Committee to Study Bills Pending in the State Legislature affecting Law Libraries, and to consult with the directors of the Association and with the Legislative Committees of the New York City Bar Association and the New York County Lawyers' Association and any other interested bodies.

At the April dinner Franklin O. Poole, Librarian of The Association of the Bar of the City of New York, gave a brief history of the library since he become a member of its staff. He mentioned a number of fundamental principles of administration he had learned, one being that "a book out of place is a book not in the library."

John J. Barry, from the Bronx County Bar Association Library, advised the members as to the duties of a librarian. "A librarian must know the books on the shelves in order to instruct those that use them." He advocated that the Association present to the Civil Service Commission a list of the required qualifications of a Law Librarian, referring to the Queens Library Bill that is awaiting the signature of the Governor, but added that one of the most essential qualifications irrespective of what type library is the virtue of "patience."

Louis Pilatsky, manager of the New York office of the West Publishing Co., gave his views on law library work as seen by those "on the other side of the fence." He stated "that there was no need for a librarian to be a lawyer but you must know your books, where to get them, what they contain, the best book for each classification."

News of the Bar Associations

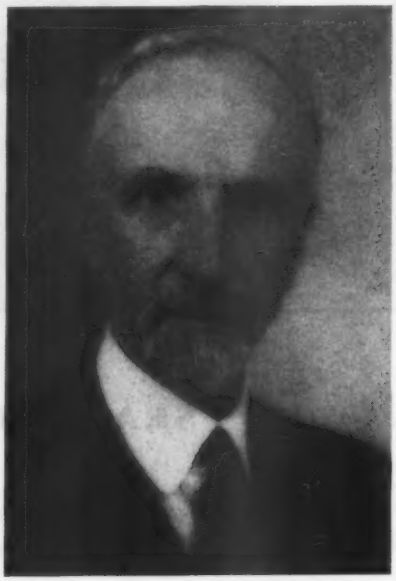
Kentucky State Bar Association—Eight Hundred Lawyers Attend Annual Meeting—Forums on Criminal and Civil Law—Statute Law Revision—Judge Thomas Honored at Banquet—New Officers

THE 1940 Annual Meeting of the Kentucky State Bar Association which was held in Louisville on April 3, 4 and 5, was attended by more than eight hundred members, representing nearly one-third of the total number of active lawyers in Kentucky. One of the major events on the program was the banquet given on the evening of April 4 in honor of Judge Augustus Thomas, who has been serving on the Court of Appeals of Kentucky (the highest court of the state) for more than twenty-five continuous years.

On the evening of April 3 and prior to the opening of the business sessions which were scheduled for the following morning, two forums were conducted, one being on Criminal Law and the other on Civil Law. The discussion on Criminal Law was held by Hon. James Park, Lexington, Commonwealth's Attorney for that Judicial District. It resulted in many interesting questions being raised and proposals being adopted with reference to changes and improvements in the administration of criminal law. The forum on Civil Law was led by Hon. James W. Stites, Louisville, a former member of the Court of Appeals, and this meeting extended over two hours, during which many of the recent opinions of the Court of Appeals were referred to and discussed, and extended consideration was given to many problems that arise in daily practice. On that same night the Association was host to all of its members and their friends at a smoker.

Statute Revision

The business sessions of the Convention opened on the morning of April 4 and addresses were delivered by Judge Lafon Allen, President of the Association, and Hon. A. E. Funk, Assistant Attorney General of Kentucky. In the course of his remarks Judge Allen discussed what was being done by a committee relative to increasing the standards and requirements for admission to the practice of law in Kentucky. He told of the general problems that had arisen in connection with complaints that had been filed against members of the Association. He reviewed the accomplishments of the Statutes Revision Committee and referred to the fact that



JOHN B. RODES
President, Kentucky State Bar Association

upon the recommendation of the Statutes Committee more than 1000 obsolete, unconstitutional, and meaningless statutes had been repealed by the 1940 Session of the General Assembly of Kentucky. Emphasis was placed upon the fact that the work of many years in attempting to secure more adequate means for providing for appellate judges had resulted in success by reason of the passage in the last General Assembly of a bill providing for pensions.

General Funk reviewed and analyzed the laws that had been enacted at the 1940 session of the General Assembly. He explained the contents of the more important bills and told why it had become necessary that the Governor veto certain measures that had been passed by the Senate and House of Representatives.

During the afternoon session addresses were delivered by Judge John T. Loughran, a member of the Court of Appeals of New York; Howard L. Barkdull, Cleveland, Ohio, a former president of the Ohio State Bar Association; and Burt J. Thompson, Forest City, Iowa, a former president of the Iowa Bar Association. Judge Loughran in the course of his remarks reviewed the obligations of members of the bench and members of the bar and urged a continuation of the high standards that have characterized the bench and bar for many years.

Probate Law Revision

Mr. Barkdull, in discussing the advisability of the adoption of a Probate Code, told the Kentucky Bar of the experiences of the Ohio Bar in obtaining the adoption of such a code and of the effects of its operation. He suggested that Kentucky "take the best of the codes in other states and apply them to local needs and conditions."

Mr. Thompson discussed Rural Legal Institutes. He urged Kentucky lawyers to adopt the system of Institutes designed to keep the average lawyer abreast of the law and to aid him in meeting problems that continually arise in the profession.

During the noon recess on Thursday a small luncheon was given by the Association in honor of Judge Elwood Hamilton, Louisville, a member of the Circuit Court of Appeals for the Sixth District; Judge H. Church Ford, Judge of the United States District Court for the Eastern District of Kentucky; Judge Shackelford Miller, United States District Judge for the Western District of Kentucky; and Judge Mac Swinford, United States District Judge for Kentucky. This luncheon was attended by the speakers on the convention program and the past presidents of the Association.

Annual Banquet—Judge Thomas Honored

The annual banquet was held on the evening of April 4. It was attended by more than 500 persons. The guest of honor was Judge Gus Thomas and it commemorated more than twenty-five years of continuous service by him on the Kentucky appellate bench. Judge Richard C. Stoll, Lexington, Kentucky, presided as toast-master. The speakers that were introduced by Judge Stoll were Governor Keen Johnson, Chief Executive of Kentucky; Hon. William H. Fulton, a member of the Kentucky Court of Appeals; Judge Elwood Hamilton, Louisville, Kentucky; Judge Richard Priest Deitzman, Louisville, Kentucky, a former member of the Kentucky Court of Appeals; and Mr. Terry P. Smith, Mayfield, Kentucky, a banker from the judge's home town. Tribute was paid to Judge Thomas for many years of useful and valuable service upon the bench. It was pointed

out that his opinions appeared in each of more than the last 100 volumes of the official Kentucky Reports. He was referred to by Governor Johnson as the "genial, lovable patriarch of the Court of Appeals." Judge Fulton described him as "truly a great Judge and entitled to be so regarded in the judicial history of Kentucky." Judge Hamilton said: "No man can read the record and find that a single line he has ever put into the printed word has shown the slightest partisanship." Mr. Smith said: "A prophet does have honor in his own town." In presenting Judge Thomas for a response Judge Stoll said: "Old friend, we love you."

Judge Thomas expressed his deep appreciation to the Bar of Kentucky for the many kindnesses that they had accorded him and said that he cherished an ambition to serve on the court longer than any other man. That goal, he said, will have been reached in about another year. He said that he was far from ready to take advantage of the recently enacted appellate judges' pension law because "I feel myself fully able to continue the performance of the duties of the position and as long as I am in that condition, I do not feel like voluntarily imposing upon the Commonwealth the burden of paying out annually an additional $5,000 with no increased amount of services." Following the response by Judge Thomas a silver service was presented on behalf of the Kentucky Bar by Judge Allen to Judge Thomas.

The banquet was followed by a dance given in honor of the visiting lawyers and their guests.

Unemployment Compensation—Taxation

At the Friday morning session of the convention, addresses were delivered by Hon. Robert Hensley, Chief Attorney for the Unemployment Compensation Commission of Kentucky, and Hon. H. Clyde Reeves, Commissioner of Revenue of Kentucky. The Unemployment Compensation Act was reviewed at some length by Mr. Hensley, in which he told of the experiences that the Commission had had during the few years that the Act had been in operation and made a number of suggestions that would be helpful to lawyers in representing both employers and employees before the Commission.

Mr. Reeves discussed problems that arise in connection with the administration of the Income and Inheritance Tax Laws and said that in so far as income taxes are concerned experience has demonstrated that "a judicious expenditure of more money for income tax administration would result in substantially increased revenues to the

State and more equitable treatment of taxpayers." In discussing the Inheritance Tax Law he said that there had been "an improvement in the inheritance tax administration and that in recent weeks final disposal has been made of four more cases daily than new ones originating." He said: "We have no interest in raising values listed, but only in taxing proper values."

Officers Elected

Prior to the opening of the convention a meeting of the Board of Commissioners of the Association was held at which the following officers were elected to serve until the 1941 annual meeting: John B. Rodes, Bowling Green, president; reelected were: L. B. Alexander, Paducah, and Francis M. Burke, Pikeville, vice-presidents; C. Hill Cheshire, Frankfort, registrar-treasurer; Samuel M. Rosenstein, Frankfort, secretary.

SAMUEL M. ROSENSTEIN,
Secretary.

The Allegheny County Bar Association (Pittsburgh, Pa.)

THE Allegheny County Bar Association endeavors to bring about an understanding of the respective duties which the public, the bench and the bar owe to one another in obtaining and promoting justice. Its policy is both to educate the lawyer in his duty to his fellow-lawyer and the profession of the law, and also to indicate to him the part that he must play in his public relationship. While so concerned with itself, the association also asks the public—the layman—to consider the reciprocal duty and attitude which must be displayed toward the law, the bench and the bar if justice must be attained. It endeavors to uphold and strengthen the power and benign influence of the courts through the cooperation of all groups of people. It is most active and progressive in its aims and work. To carry out its purposes and policies, the association works through sixteen committees, all of which are important and a part of the general plan and aims of the association.

The Committee on Offenses, composed of fifteen members appointed by the President of the Bar Association and approved by the Court of Common Pleas of Allegheny County, sits continuously to hear complaints and charges against lawyers. During the past year, it has recommended several disbarments, suspensions, and reprimands of various lawyers involved in a public scandal. The Bar Association has been commended by the newspapers, editorially and otherwise, and by the public, because of its initiative, courage, and results in this respect.

The Committee on Public Relations is very active in maintaining proper reciprocal relationship between the public and the legal profession. For the past two years a radio program has been instituted over station WCAE and has received the favorable approval of the public. Talks are delivered over a fifteen-minute period each week from January to May inclusive. This week Jan. 11, 1940, the committee begins a new program of twenty addresses in its endeavor to inform the public of the various phases of new laws, their interpretation and meaning and any other matter of information and legal interest to the public. This committee also makes speakers available upon request to high schools and private and public organizations.

The Committee on Legislation, which receives and studies statutes presented to it by lawyers and the public, has during the past legislative session held hearings and reviewed many proposed statutes and codes. It made a thorough study of the new Criminal Code and gave much assistance to the Legislative Committee in drawing up the final code which was presented to the Legislature.

The Committee on Unauthorized Practice of Law has been very active in investigating complaints against persons, firms and corporations not authorized to practice law. It has instituted and prosecuted legal proceedings, criminal and civil, to prevent unauthorized practice. Several suits are now pending for injunctions, while conferences are being held with insurance agents and trust companies concerning the elimination of various phases of unauthorized practice.

The Committee on Legal Institutes during the winter season of 1939-40 arranged a program of institutes as follows, without charge to those attending: Pennsylvania Corporation Taxes and the Pennsylvania Personal Property Tax; Some Legal Problems from a Summer Vacation Trip; The Lawyer and His Client; Duties and Powers of the Trustee; The Doctrine of Promissory Estoppel in Contracts; Federal Estate Taxes—Valuation of the Gross Estate. After the lecture a general discussion is permitted. Each institute is followed by a luncheon. By reason of the keen interest of the lawyers in the subjects and the high quality of the lectures, these institutes have become very popular with the members of the bar.

The Committee on Placement is now at work establishing a bureau for placing lawyers in offices or providing employment for them. The field is yet undeveloped. It will require some time to set up the complete machinery, but the committee is progressing with its work.

Last summer the Allegheny County Bar Association endorsed and recommended Charles Alvin Jones for Judge of the Third Circuit Court of Appeals. He was later appointed by the President.

Boise, Idaho

The Bar Association of Boise has just held the State's first legal institute held in this state. It was a great success. The subject for discussion was the Securities Act of 1933. Chapter X of the Chandler Act, especially as it comes within the influence or jurisdiction of the S. E. C., and the Trust Indenture Act of 1939, were also discussed. These matters were presented by highly qualified men, under the direction of Day Karr of Seattle, the Regional Administrator of the S. E. C. Substantially all of the Boise attorneys and many attorneys from adjoining districts were present. Comments of the attorneys on the success of the Institute have been commendatory and it has been suggested that such Institutes be held quarterly.

Cincinnati

THE Executive Committee holds a luncheon meeting every Friday Members of the various committees and other members of the Association attend. The attendance ranges from twenty to thirty-five and in the course of a year will include 100 different members of the Association. All matters and communications which in any way concern the Association or the legal profession are discussed and voted upon at this meeting. The Executive Committee has full power to act upon most matters. If any matter requires special study, it is referred to the proper committee, which reports back to the Executive Committee for further action. Four quarterly dinner meetings are held by the Association and each of these meetings is attended by more than one third of the total membership of 820. Printed reports of each of the committees are submitted and such further action is taken by the Association as may be required in the particular case. There are about twenty active committees and such special committees as may be appointed from time to time to take care of particular matters.

Particular stress could not truthfully be laid upon any branch of our work. Three or four matters are taken up at each Friday meeting and at least twelve of the committees are very busy. Of course, the nature of the work of one

or two of the committees is such that it is "noisier", but the concrete results are greater and the work harder and nastier in such a committee as "investigation"; its work is inexpensive, and its members are "unsung."

The committee on legislation is composed mostly of members of the State Legislature. It makes a detailed report from time to time during the session of the legislature on all pending bills of interest to the legal profession. It also takes an active part in the enactment of measures sponsored by the Bar.

The committee on unauthorized practice of the law is very vigilant in preventing such practice by realtors, banks, collection agencies, etc. It has been successful in a number of injunction suits.

The committee on legal aid keeps in constant touch with the work of the local legal aid society and recommends such assistance, including financial aid, from the bar as it deems necessary to improve the service.

The committee on candidates for judicial office conducts a questionnaire on all judicial candidates and takes such steps as are necessary and possible to acquaint the voting public with the result.

The committee on activities of junior members is very active in promoting the interests of the younger members of the bar. Each year it sponsors several programs aimed to educate the younger members in the art of practicing law in various fields, such as bankruptcy, examination of titles, probate work, and the preparation and trial of cases.

The committee on public relations last year published a series of short articles which aimed to acquaint the public with the work of courts and lawyers. It is working along the same lines this year.

An effort is also made to keep in touch with the work of the Ohio State Bar Association and to cooperate with it. The representative of this association in the house of delegates of the American Bar Association gives a comprehensive report of the proceedings of each meeting of the latter association and makes such recommendations to the local bar association as he deems advisable.

The eighth annual "law institute" will be held in March, 1940.

C. E. W.

Cleveland

NINE judges of the Probate, Common Pleas and Appellate Courts were cited on account of public careers which commenced twenty-five or more years ago, at a meeting of the Cleveland Bar Association which was held Tuesday, April 2, 1940. John P. Green was present on the occasion, which was his 95th birthday. He was given a rousing welcome. President L. B. Davenport gave the citations to these judges:

Judges Honored for Long Service

Judges of the Court of Appeals: Hon. P. L. A. Lieghley, 35 years; Hon. Virgil J. Terrell, 32 years.

Common Pleas Court Judges: Hon. Samuel E. Kramer, 32 years; Hon. George P. Baer, 35 years; Hon. Homer G. Powell, 26 years; Hon. Samuel H. Silbert, 29 years; Hon. Alva R. Corlett, 34 years; Hon. Frank S. Day, 31 years.

Probate Court Judge: Hon. Nelson J. Brewer, 32 years.

Practically Entire Trial Bar Attends Institute

Four hundred members of the Association attended the Institute of the Association on April 17, 18, and 19, with Prof. Laurence H. Eldredge of the Law School of the University of Pennsylvania speaking on the subject "Modern Tort Problems." Prof. Eldredge discussed such topics as "Negligence: What is it?"; "Absolute Liability in Tort Law"; "Liability of Radio Broadcaster for Defamation"; "Landlord's Liability for Disrepair"; "The Right of Privacy"; "Liability to Children for Pre-Natal Injury." Practically the entire trial Bar of Cleveland was present. The majority of the audience was made up of men and women past 35 years of age.

The Association in the past month asked the Ohio delegation in Congress to provide for an additional judge in the United States District Court, Northern District of Ohio. The argument in favor of such an additional judge which was sent to Washington, asserted that since 1923, when the third judge in the district was added, the work has increased almost threefold.

WAYMON B. McLESKEY
President, Columbus Bar Association

New Officers

The fiscal year of the Association will end May 7 at which time new officers will be elected. The report of the nominating committee was read at the April meeting of the Association and there were no nominations in addition to those thus presented. As a result Herbert A. Spring will be elected president on May 7 for a period of one year. Marcellus DeVaughn will be vice president and Herman H. David treasurer. The following will be members of the executive committee for three years: Jerome N. Curtis, Raymond Dacek, Leonard H. Davis, Isador Grossman, Harry E. Smoyer, and Howard H. Webster.

Mr. Spring has served as a member of the executive committee of the Association, chairman of the campaign committee, and chairman of the grievance committee, and has been active for years in other capacities in the Association. He graduated from the University of Colorado in 1914 and was admitted to the Bar of Ohio in 1916.

Columbus

AMONG the many activities carried by The Columbus Bar Association, the following might be of special interest:

1. For the past two years we have maintained a Speakers' Bureau.

2. We are carrying on at the present time a series a weekly original broadcasts, which are in the form of skits and are written and produced by our own members.

3. Each year we hold the "Columbus Forum," at which legal problems are discussed by experts. Last year the new Federal rules was the topic, while this year it was "Trends in the Decisions of the Supreme Courts of Ohio and of the United States." Approximately 360 attended.

4. We conduct each year a referendum on the judicial candidates and make public the results.

5. Our Grievance Committee is divided into two sections, the Investigating Section and the Judicial Section. The purpose of this division is to separate the prosecuting and judicial functions of the Committee. The Investigating Section investigates all charges made against lawyers whether oral or written, upon its own initiative or otherwise. The charges are either dismissed or presented to the Judicial Section. The Judicial Section has no connection what-

soever with the investigation but sits as a judicial body to determine probable guilt or innocence. If he desires, the lawyer may appear with or without counsel and present his defense. If the Judicial Section finds he is probably guilty of unethical conduct, the matter is presented to our Common Pleas Court.

6. Our Committee on Judicial Administration and Legal Reform is divided into six sections, each section working with a local State or Federal Court. This system is based upon the theory that the profession is primarily responsible for the administration of justice and that it is the duty of the Bar to cooperate with the Bench in that enterprise.

7. Our Committee on Law Enforcement advises, consults and cooperates with other groups or organizations who may be interested in law enforcement.

8. For three years our Association has successfully opposed the reinstatement of disbarred lawyers.

Economics of the Bar

9. The Association recently conducted a survey in Columbus as to practice available, good will, etc.

10. Our Committee on Professional Economics is considering an economic survey, a list of lawyers to whom the public may be referred, an endowment plan, a credit bureau and an employment bureau for young lawyers and legal stenographers.

11. Last year the Association held joint meetings with the Press, Junior Chamber of Commerce, physicians and ministers. This year, in addition to those groups, meetings are being planned with the Real Estate Board, Senior Chamber of Commerce, labor, insurance underwriters, Builders Exchange, social workers and other similar organizations.

12. Three of our Committees are cleaning up abuses practiced by both laymen and lawyers before the Industrial Commission of Ohio, and we are cooperating with other civic agencies to prevent their recurrence.

13. Last year we secured 140 new members, an increase of approximately 35 per cent. This year we have secured 35 new members, making our membership approximately 540.

W. B. MCLESKEY, President.

New Orleans

AT the annual meeting of the New Orleans Bar Association on Nov. 27, 1939, Sumter D. Marks, Jr., was elected president, Rudolph J. Weinmann, Lawrence K. Benson and Eugene Thorpe vice-presidents, John Minor Wisdom secretary, and J. D. Dresner treasurer.

The association furnishes speakers for monthly talks at the public library auditorium on subjects of interest to laymen, dealing with subjects selected by the sociology department of the public library; it also conducts, through the junior barristers group, a weekly radio talk or interview, designed to interest laymen.

PIERCE BUTLER, JR.
President, Ramsey County Bar Association, St. Paul, Minn.

The junior barristers, a group of about 300 young lawyers within the association, who have not practiced more than seven years, and who function largely through their own committees, also have conducted a speaking campaign in the past year before high schools, parent-teacher associations, churches, and clubs on the subject of juvenile crime prevention. This activity, also carried on by the State Bar of California throughout the state, has proved one of the most popular ever undertaken by the local bar.

Our association recently organized a placement bureau, the purpose of which is to discover and promote employment opportunities for the younger lawyers. It is hoped that the undertaking will furnish a convenient and practical means of assisting not only those who are seeking legal employment, but also those law offices and governmental agencies that may be in need of legal assistance and legally trained employees. No charge is made to applicants in this association.

The association conducts a plebiscite on candidates for election to the trial courts, in which the lawyers of the county are given the opportunity to vote upon the qualifications of the several candidates, and the result of which is announced to the public through the press and other media. It also conducts a plebiscite on candidates for appointment to the bench whose names may be under consideration by the governor, and communicates the result to the governor, but not to the public.

The Los Angeles Bar Association is active in the work of the integrated State Bar of California, appointing and sending, to the annual conference of State Bar Delegates, 42 representative members, usually with a well-considered program of changes in procedural law and recommendations designed to promote the welfare of the public.

Legal aid has long been the deep concern of the association. Its members have contributed voluntarily to the legal aid foundation in order to supplement the fund made available by public agencies for this necessary work, and in other ways gives its co-operation and assistance. Many of the young lawyers give time, at stated periods, to the legal aid foundation. The problem of adequate and continuous support for legal aid is, however, still an unsolved problem.

It has appointed a special committee on reforms in appellate procedure, to study reforms by rule amendment rather than by statutory change, and another committee to study rules relative to criminal procedure.

Last, but not least, the association publishes a monthly "Bar Bulletin," which we believe is entitled to class among the best of the local legal publications in the country. Its cost is largely covered by the advertising carried. Its circulation is considerably wider than the membership of the association.

Houston, Texas

THE outstanding feature of the Association's work this year was the legal institutes, under the leadership of St. John Garwood, vice president. Eleven lectures were given by outstanding jurists of the country. All were well attended.

The board of directors established the offices of the executive secretary in the courthouse. While the office only operated during the months of November and December, very substantial results were accomplished. Complete information on lawyers has been assembled and we hope to make the Association practically all-inclusive for the ensuing year. Fourteen hundred have registered from the city under the new State Bar Act. The Association was able to be of considerable service in registering older members of the bar who had lost their

A good start was made in dealing with the problem of unauthorized prac-

tice. The Committee made a tentative report of the widespread encroachments by abstract companies, trust companies, and so-called experts before administrative boards. The Association voted unanimously to give the committee a free hand. The committee is negotiating a contract with the abstract companies which it is thought will meet with the approval of the Association, and, if it does, will serve as a basis for contracts with the other institutions.

J. S. B.

Toledo

A new jury selection plan, which proponents claim will result in a higher type of juries, has been placed in operation in Lucas county. The plan was worked out by the judges of the common pleas court and a committee of the Toledo Bar Association, composed of Milo J. Warner, chairman, and John D. Black, secretary and nine other members.

In general the new system will provide for the calling of juries by mail and for a pre-examination of those who may seek to be excused from jury service. Under the plan, the first notice to prospective jurors will be sent in a sealed envelope. With each will go a warning as to penalties if the person notified fails to heed the instructions to appear for examination.

If the prospective juror is found satisfactory by the commissioners, his name is placed in the jury wheel, as in the past. Then when the 300 or so names are drawn from the wheel at a beginning of the term, a second sealed notice will be sent to all the prospective jurors thus drawn.

In that notice a time will be fixed for the appearance before a judge of the court to lodge protests to service, if conditions have arisen that the juror feels precludes service.

The judge will determine whether the excuse offered is justifiable. From time to time, jurors from these 300 will be notified by the sheriff to report for service. Those who definitely are discharged by the court will not be served by the sheriff, and a saving of several hundred dollars a year thus may be effected, it is said.

New York County Lawyers' Association

WITH respect to the activities of the Association it may be said that they are constantly broadening in scope. The Forum & Social Committee has been conducting a series of forums at which topics of interest to the bar, and particularly to the younger members of the bar, are being discussed by leaders in the particular field.

The Committee on Bankruptcy, under the leadership of Norman S. Goetz, Chairman, has conducted a series of lectures on the Chandler Act entitled "One Year of the Chandler Act."

At each of the seminars there was a large attendance of the Bar, and on each occasion there were many Referees in Bankruptcy present in the audience or on the platform, not only from the Southern District but also from Brooklyn, New Jersey, and up State New York. On the occasion of the last seminar, Senior District Judge Knox attended.

It may be confidently stated that these seminars have served a useful purpose, not only in extending information to interested lawyers, but in giving to the members of the Association an added service.

Other committees of the Association are engaged in activities which are equally important as those above outlined.

TERENCE J. MCMANUS,
Secretary.

Association of the Bar of the City of New York

Charles H. Strong, secretary of The Association of the Bar of the City of New York, mentions some of the recent features among the many activities of that association:

A forum, at which the subject of discussion was the Securities and Exchange Commission Act, the chief speakers being Jerome N. Frank, commissioner, Chester T. Lane, general counsel, and Arthur Hobson Dean of the New York City bar.

Elaborate reports from the committee on law reform, relating to:

(1) Consolidation of the courts in the city of New York;

(2) The proposal that secretaries to judges be required to be lawyers and be prohibited from practising law;

(3) A proposed act to protect resident debtors against adverse claims, where one of the claimants cannot be interpleaded because not subject to personal service of process within the state;

(4) A proposal to substitute a mandatory amendment to the State constitution conferring the rule-making power on the courts absolutely, in place of the permissive amendment, which merely authorizes the legislature to delegate such power to the courts;

(5) A recommendation that the law enacted in 1939, requiring the filing of partnership certificates by persons transacting business as partners under a partnership agreement, be expressly made applicable to professional partnerships, and recommending other revisions of various sections of the penal law and partnership law in order to remove ambiguity and eliminate unnecessary duplication in the filing of partnership certificates.

(6) A recommendation that the statute of limitations on sealed contracts shall be six years, the same as for unsealed contracts.

Continuous examination, by the committee on federal legislation, of legislation pending in Congress and the submission of reports thereon to the executive and to the Congress.

Similar action by the committees on state legislation, criminal courts, law, and procedure, and taxation.

Printed bulletins from these committees are transmitted at short intervals to the respective legislative bodies and to the executive.

Much important and far-reaching legislation is affected by this process and the Association is frequently the recipient of commendation with respect to the reports of these committees from the executives and the congressional and legislative members.

The committee on the judiciary has represented the legal profession most effectively with respect to appointments and elections to the court of appeals of the State of New York, the supreme court in New York county and Bronx county, and to the court of general sessions, a criminal court in New York city.

The Association has created new committees as follows: on the bill of rights with former attorney-general William D. Mitchell as chairman, on administrative law with John Foster Dulles as chairman, and on labor and social security legislation with William L. Ransom as chairman.

A symposium under the joint auspices of the committees on aeronautical law of the New York State Bar Association, The Association of the Bar of the City of New York, and the New York County Lawyers' Association, participated in by S. Paul Johnston, editor of "Aviation," speaking on "Air Power in the European War," William M. Wherry, chairman of the committee on aeronautical law of the New York County Lawyers' Association, on "Aerial Bombardment in International Law," and Major Al Williams, Air Corps, U. S. Marine Corps Reserve, speaking on "Aerial Bombardment in Modern Warfare."

North Carolina State Bar Holds Annual Meeting — New Officers Elected

THE annual meeting of the North Carolina State Bar was held in Raleigh, Oct. 27, with the largest attendance in the six year history of the organization. Geo. C. Green of Weldon was elected President for 1939-40, succeeding Fred S. Hutchins of Winston-Salem. Mr. Green was Vice President during 1938-39. L. P. McLendon of Greensboro was elected Vice President. At the morning session of the meeting, attorneys present enjoyed a delightful address by J. C. M. Vann, brilliant member of the Bar from Monroe.

Hon. Carl A. McCormick of Buffalo, New York, Proctor of the Eighth Judicial District, gave a very interesting discussion of the problems of unauthorized practice of the law. A standing committee has been appointed from the Council of the State Bar to deal with this subject: Bennett H. Perry of Henderson, Chairman, Hon. Albion Dunn of Greenville, and R. P. Reade of Durham comprise this committee.

The feature address of the meeting was delivered by Hon. Charles A. Beardsley, President of the American Bar Association, entitled "War and the Administration of Justice." Station WPTF in Raleigh (NBC) carried the full address.

Hon. Bolitha J. Laws, Federal District Judge in the District of Columbia, spoke to the meeting on the subject, "Pre-Trial Procedure." With Judge Laws' wide experience and the ever increasing interest in this subject, the members of the Bar were particularly interested in the informal and practical manner in which Judge Laws described the success already attained in Pre-Trial Procedure and the future possibilities and benefits which might be expected both to the profession and the public.

At the afternoon session Hon. Harry McMullan, Attorney General, made an interesting report on the progress being made in recodification of the statutes. The last legislature authorized the Attorney General to set up such a division in his office. The Attorney General requested from the members of the Bar suggestions in order that his office might present as complete a report as possible to the next session of the General Assembly.

Paul F. Hannah, Chairman of the Junior Bar Conference of the American Bar Association, gave an address entitled "The Bar Banishes the Blackout." Mr. Hannah outlined the work of the Junior Bar Conference, particularly with respect to the public relations program. Several groups in this state have already undertaken a public relations program for their localities and a number of groups have been organized throughout the state during the past year. It is expected that very interesting results will be reported by these groups to the Conference and to the next meeting of the State Bar.

Hon. Burt J. Thompson of Forest City, Iowa, a well-known figure to members of the Bar throughout the country, gave a very interesting discussion on the subject of Legal Institutes. His wide experience with such institutes in Iowa and elsewhere has been so successful that the North Carolina State Bar was interested in having him give firsthand information as to the results which might be expected from a similar program in this state.

EDWARD L. CANNON,
Secretary.